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HCAL 120/2009

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 120 OF 2009

BETWEEN

W Applicant

and

REGISTRAR OF MARRIAGES Respondent

Before: Hon Andrew Cheung J in Court
Dates of Hearing: 9 and 10 August 2010
Date of Judgment: 5 October 2010

J U D G M E N T

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1 INTRODUCTION

1.1 Issues raised

1. This application for judicial review raises questions of some general public importance. The immediate issue it raises is whether a post-operative male-to-female transsexual may marry a man (as opposed to

a woman) in Hong Kong, either as a matter of law pursuant to the provisions of the Marriage Ordinance (Cap 181), or as a matter of constitutional entitlement under the Basic Law and the Hong Kong Bill of Rights.

2. However, by parity of reasoning, the issue so raised also affects the analogous case of a post-operative female-to-male transsexual, that is to say, whether such a transsexual person may marry a woman, as opposed to a man, in Hong Kong.

3. Indeed the position of a post-operative male-to-female transsexual and that of a post-operative female-to-male transsexual are so similar that in these proceedings, they have been dealt with together without much differentiation. The Court's decision on the right to marry of a post-operative male-to-female transsexual would inevitably also determine, at least as a matter of principle, the analogous right of a post-operative female-to-male transsexual person to marry.

4. On the other hand, there are issues which this application for judicial review does not directly raise, and which the Court's decision would not directly answer. However, it would be unrealistic to pretend that the Court's decision would not have a general bearing on these wider or related issues.

5. First, the position of *pre*-operative transsexual persons in terms of their right to marry. I will presently come to the significance of the relevant surgical procedures, referred to properly as sex reassignment surgeries (SRS) or gender reassignment surgeries, or commonly as sex

change operations. Depending on the Court's decision on whether a post-operative transsexual person may marry in his or her desired sex, the position of a pre-operative transsexual could be affected. In other words, if the Court were to decide that a post-operative transsexual person cannot, as a matter of Hong Kong law, marry in his or her desired sex, by the same reasoning, neither may a pre-operative transsexual person.

6. On the other hand, if the Court were to come to the opposite conclusion and decide that a post-operative transsexual may marry in his or her desired sex (whether generally or in some specified circumstances), the same reasoning or logic may or may not overflow to cover the case of a pre-operative transsexual. There may or may not be sufficient distinguishing features to differentiate the two cases, whether in terms of the undergoing of SRS or otherwise.

7. Secondly, depending on how "sex" is to be defined, this application might be regarded as raising the question of same sex marriage in Hong Kong. If sex here is viewed as meaning biological sex determinable and determined at birth which cannot be changed subsequently, the present case does directly raise the question of whether same sex marriage, meaning marriage between two persons of the same biological sex, is permitted in Hong Kong, at least so far as post-operative transsexual persons are concerned.

8. On that basis, one cannot shy away from the fact that the determination by the Court of the issue actually raised in this application would have implications for other possible forms of same sex marriage, such as marriage of homosexual or lesbian couples.

9. The Court's determination of the issue raised in this application would have ramifications from another perspective. The Court's decision on whether a post-operative transsexual person may marry, as a matter of law, in his or her desired sex, would obviously not only affect the transsexual's and his/her intended spouse's personal and marital status, but could also affect their rights and interests in many areas of law, such as family (including adoption), succession, immigration, property rights, taxation, criminal law (gender-specific offences) and social welfare. This is because determination of the question of what constitutes a "man" or "woman" for the purposes of the law of marriage could also affect how those words and related terms are understood in other areas of law.

10. Having said all that, one must, nonetheless, focus on the immediate issue raised in the present application for judicial review, namely, whether a post-operative male-to-female transsexual person can, as a matter of Hong Kong law, marry a man?

11. This question has been approached on two levels in these proceedings, and the same approach will be followed in this judgment. The two levels are: first, under the Marriage Ordinance and related legislation; and secondly, on the constitutional level.

1.2 Sex and transsexualism

12. Most laymen would like to think that there is no difficulty in identifying a person's sex. That must be true in most cases. Normally, physical appearances would be a sufficient guide. Physical appearances

would include what are called secondary sexual characteristics, such as body hair, breasts, and fat distribution. A person's voice and the presence or absence of an Adam's apple are also good indicators. Where necessary, from a layman's point of view, an examination of the person's external sex organ (genital) would be conclusive. To those who know something about human anatomy, they may include the presence or absence of male or female internal organs, such as ovaries, testes, prostate gland and uterus, to the list of indicators. Still for those who have heard something about chromosomes and the X and Y chromosomes, they would say that the ultimate test of a person's sex is his or her chromosomal make-up (ie "XY" for male and "XX" for female).

13. All of these may be loosely described as the biological indications of a person's sex, and a person's sex determined in accordance with such indications is referred to as the biological sex of the person. In a majority of cases, all these indications would be congruent; in most cases, there can be no doubt regarding a person's biological sex, even at birth, leaving aside the relatively rare and special case of inter-sexed persons.

14. Yet there is another side to the story. There are a minority of people who, genuinely, do not accept their own "sex" as determined by the biological indications described above. One is not talking about here sexual orientation, ie the preferences for sexual relationship with a male or a female. One is concerned with people who are unhappy with, and indeed do not accept, their own biological sex. They genuinely believe that they belong to the opposite sex. Whilst many others might view the phenomenon as a psychological problem on the part of the person in question and regard the individual as suffering from a wholly

misconceived, albeit genuine, perception of his or her own sex, to the individual concerned, it is the other way round. To the individual, what is wrong is not his or her perception and conviction, what is wrong is the body, which is out of harmony with the mind. In other words, the person feels and believes that he or she is trapped in a body of the wrong sex. From their perspective, their desire, and the ultimate solution, lie not with the "correction" of their subjective belief and conviction. The ultimate cure lies with the conversion of their body, so far as is humanly possible, to the body of the opposite sex to which they believe they belong. To such a person, his or her "true" sex is represented by their own belief, rather than by what their body otherwise suggests. The sex identity that the person believes he or she has may be referred to as the person's psychological sex.

15. Thus analysed, it is immediately apparent that what a person's sex is, whether a person is "male" or "female", and whether such a person, in adulthood, should be described as a "man" or "woman", are ultimately questions of definition. Put another way, the crucial issue is: whose definition?

16. Before dwelling on this question further, it is necessary to give further descriptions of the condition that the person under discussion has medically. Such a person is described as a transsexual or a transsexual person. He or she is suffering from a medically recognised condition known as transsexualism, gender identity disorder (GID), or gender dysphoria. Some, including those who believe that the aetiology of the condition is at least partly biological in nature, do not prefer the description "disorder". Apart from the stigma that the word may possibly

carry, one consideration that is relevant to the issues raised in these proceedings is that the use of such a word may beg the very question that the Court has to answer, that is to say, what really is the sex of the person who is having this condition under discussion. To say that the person is suffering from a "disorder" might suggest that what is wrong with the person is his or her non-acceptance of, or inability to accept, their own (biological) sex, rather than that their body does not match their perceived sex; and thereby prejudging the ultimate issue.

17. From the evidence, it would appear that medical science's understanding of a person's sex and its determination thereof have moved away from a purely biological approach to a more holistic one. The modern approach involves a consideration of not only the biological indicators, but also of other factors such as the psychological conviction of the person and social perception.

18. One other matter that the voluminous materials placed before the Court in these proceedings speak with one voice is that according to present day medical science, transsexualism cannot be cured, in the sense that the person's psychological or subjective belief about his or her own sex cannot be changed by medical or psychological treatment. It is incurable in that sense. The standard and indeed "necessary" treatment for somebody suffering from transsexualism is a process of "sex change", by which, instead of changing the person's self-perception as a man or woman, one seeks to change, by means of psychiatric and psychological support, hormonal treatment and eventually surgical procedures, the body to match the person's perception, so far as is humanly attainable.

19. Whilst it may be difficult for those who do not suffer from the condition to fully understand or identify with the mental, psychological, physical as well as social difficulties and hardships that those having the condition have to endure, it is not wholly impossible to imagine what some of those difficulties and hardships are. Moreover, from the nature of things, one may safely proceed on the assumption that unless one is concerned with a genuine transsexual person, who finds that he or she has no other way to turn to, no one would be prepared to undergo a sex reassignment surgery. In other words, when considering the issues involved in the present case, the possibility of fake cases may be safely ignored.

20. In this judgment, to simplify expressions, I would, where convenient, refer to a post-operative male-to-female transsexual person as a post-operative transsexual woman, or simply as a transsexual woman. Likewise, I would refer to a post-operative female-to-male transsexual individual as a post-operative transsexual man, or simply as a transsexual man. Those expressions are used without suggesting what their sex, for the purposes of law generally or of the law of marriage, is. However, when I use the term "transsexual persons" or the like, unless the context otherwise suggests, I refer to both pre-operative as well as post-operative transsexual persons. For post-operative transsexual persons, including the applicant W in the present proceedings, I would refer to them in their preferred sex, for the sake of convenience. In other words, for instance, W would be referred to as a she in the judgment below, without signifying any prejudgment of the issues that the Court is asked to decide. Lastly, whilst there is, depending on the context, a subtle difference between "sex" and "gender", I would, in this judgment, use the words interchangeably, save where otherwise indicated by the context.

2 PRESENT CASE

2.1 Medical and expert evidence

21. It is helpful to elaborate on some of the medical and expert evidence available.

22. According to the medical evidence filed, a person's sex identity is made up of various components, which may be divided into biological and psychological ones.

23. The biological components refer to a person's genetic composition (presence or absence of the Y chromosome); gonads (structure of ovaries or testes); hormonal function (circulating hormones and end organ sensitivity); internal genital morphology (presence or absence of the male or female internal structures such as the prostate gland and uterus); external genital morphology (structure of the male or female external genitalia); and secondary sexual characteristics (body hair, breasts and fat distribution). For the psychological components, they include gender identity (the self-perception as a male or female); social sex role (being masculine or feminine and living or dressing as male or female); sexual orientation (which can be homosexual, heterosexual, asexual or bisexual); and sex of rearing (the sex that one is brought up with).

24. Traditionally it has been assumed that anatomic genital sex (male or female) is concordant with gender (which means the internal, psychological self-perception as a male or female). However, the medical profession now recognises that this is not necessarily the case. There are some individuals who live as cross-gendered and who perceive themselves

as belonging to the gender not usually associated with their anatomical sex. Some would seek medical assistance, including hormonal treatment and surgical intervention, to change their physical sexual characteristics so that the internal self-perception and the physical attributes can become congruent as far as is medically possible, thus increasing their self-comfort and enabling them to better fit in society in their chosen gender. This is known as transsexualism.

25. According to the evidence filed in these proceedings, transsexualism is medically defined as a desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomical sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex. According to the *International Statistical Classification of Disease and Related Health Problems* (version 10) published by the World Health Organization which is adopted by hospitals under the Hospital Authority as the official disease classification system, transsexualism is recognised as a medical condition under the category "Gender Identity Disorders" (GID), which is coded "F64". There are altogether five different conditions classified under GID and transsexualism is one of them. It is given the code "F64.0". Transsexualism is also sometimes referred to as gender dysphoria (such as in the UK Gender Recognition Act 2004). A transsexual, or a transsexual person, is somebody suffering from the form of GID described above.

26. A transsexual is different from a cross-dresser (previously referred to as a transvestite). A cross-dresser is a person who at times

dresses as the other gender so as to be publicly perceived as such or for sexual pleasure.

27. There is also a difference between a transsexual and a transgender individual. "Transgender" is a medically non-specific, broad term describing a wide spectrum of cross-gender experience by different people. It is not a medical diagnosis or condition. A transgender individual may be taken as somebody who seeks to take on the social role of the other gender, either full time or part time, often with the assistance of hormone therapy, but who may not desire sex reassignment surgery. On the other hand, transsexuals usually desire full hormonal transition and SRS.

28. A transsexual person is also to be distinguished from an inter-sexed person. Intersexuality refers to the congenital condition where the physical appearance of external sex organs cannot be distinguished into male or female. It is due to some anomaly in chromosomal, gonadal or anatomical sex development. There is usually a detectable underlying organic cause.

29. The aetiology of transsexualism awaits further scientific investigation. Whilst it is generally thought to be a psychological condition, some recent studies have suggested that the condition may have a biological basis and that it is strongly associated with the neuro development of the brain. However, the claim that the aetiology of transsexualism is biological and congenital in nature still requires further research and proof.

30. What is common ground, however, is that according to present day medical science, transsexualism is "incurable", in terms of changing the transsexual's psychological belief and self-perception to conform to the sex suggested by his or her biological and anatomical features and characteristics. According to some expert materials and evidence, SRS procedures, which seek to alter the physical appearance or characteristics of the transsexual so as to conform to his or her psychological gender, constitute "very effective and appropriate treatment for transsexualism or profound GID". SRS procedures, along with hormone therapy and real life experience, "are not optional in any meaningful sense", but are understood to be "medically indicated and medically necessary" for the treatment of the condition. *The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders, Sixth Version* (February 2001), p 18.

31. According to the expert evidence filed (affirmation of Dr Yuen Wai Cheung Albert filed on 28 January 2010):

> "8. For male-to-female transsexual surgery, breast augmentation is done for patients whom the breast enlargement after hormone treatment is not sufficient for comfort in the social gender role. Genital surgery includes at least orchidectomy (removal of both testes), penectomy (removal of penis), creation of a new vagina. The new vagina enables penetration of penis during sexual intercourse. There is preservation of erotic sexual sensation. However, surgery cannot remove the prostate organ or provide a functional uterus or ovaries, or otherwise establish fertility or child bearing ability. Neither can it change the sex chromosomes of the person, which remains that of a male ("XY").
>
> 9. For female-to-male transsexual surgery, the female breasts would be removed. The uterus, ovaries and vagina are removed. Construction of some form of penis is performed. There are different ways of constructing the penis, depending on the desire of person who would balance the risk of physical injuries inflicted on one's body due to the surgery with the benefits. The

> form of penis construction ranges from an elongation of patient's clitoris (metoidioplasty), raising an abdominal skin tube flap to mimic a penis, to the micro-vascular transfer of tissue from other parts of body to perineum to have a full construction of a penis inside which there is a passage for urine. The best outcome at present is that after surgery, the person can void urine while standing and can have a rigid penis which means it is rigid all the time, as opposed to an erected penis which is flaccid normally but becomes rigid when sexually aroused. However, the new penis, even fully constructed, cannot ejaculate or erect on stimulation, although it will not affect the person's ability to have sexual intercourse and the person can still penetrate a vagina and have sensation in the penis and achieve orgasm because the clitoris and its nerve endings are preserved. The person cannot be provided with prostate (a male sex organ which secretes prostatic fluid which when combined with sperms produced by the testes forms the semen; a female does not have such an organ) or any functioning testes and will have no ability to produce semen, to reproduce or otherwise to impregnate a female. The sex chromosomes also remain those of a female ("XX")."

32. Surgery of either form, however, cannot change the chromosomes of the person or establish fertility. Surgery can change the sex phenotype to suit the patient's gender identity so that his or her distress can be relieved. Surgery can also enable the individual to feel better accepted as a member of the desired gender. Surgery, however, cannot change the genetic sex.

2.2 Position in Hong Kong

33. At least in Hong Kong, SRS is the last stage of the standard therapeutic regimen administered by the Hospital Authority to a transsexual person. The treatment process comprises initial assessment of the condition of GID, ongoing assessment of the person's ability to live in the preferred gender role with prescribed hormonal treatment of the opposite sex, and, as mentioned, SRS as the final step. The whole regimen

takes several years to complete, and needless to say, for a variety of reasons, not all transsexual persons would undergo the ultimate and irreversible SRS procedures.

34. According to the Government, it recognises the problems and plight of transsexual people. In 2005, the Government set up a "Gender Identity and Sexual Orientation Unit" to handle gender identity and sexual orientation issues and to liaise with relevant non-government organisations in relation to the same. Amongst other things, the Unit is responsible for maintaining an enquiry and complaint hotline, keeping statistics and details of the enquiries and complaints for future reference, conducting research on gender identity and sexual orientation issues, and organising further promotional activities to promote equal opportunities on the ground of sexual orientation. It also serves as the secretariat of the Sexual Minorities Forum, a forum set up by the Government for policy review and formulation purposes. It provides a channel for non-government organisations and the Government to exchange views on human rights and other issues concerning sexual minorities (including transsexual persons) in Hong Kong. Treatment of transsexualism, leading ultimately to surgical intervention, is publicly funded and is available in specialist hospitals and clinics managed by the Hospital Authority.

35. As is illustrated by the case of W, after a successful sex reassignment surgery, a medical certificate would be provided by the doctor in charge, to certify the newly acquired gender of the post-operative transsexual individual.

36. Based on the certificate, the individual may apply for the issue of a replacement Hong Kong identity card, and indeed for the issue of a new HKSAR passport, to reflect his or her newly acquired gender. However, it remains the Government's position that so far as birth certificates are concerned, the relevant entry on the individual's birth certificate cannot be changed. Most importantly, the Government maintains that so far as the law of marriage is concerned, the sex of the individual is determined at birth and cannot be changed.

37. For a more critical examination of the factual and legal position in Hong Kong, see the two highly readable articles by Robyn Emerton, *Neither here nor there: The current status of Transsexual and other Transgender Persons under Hong Kong Law* (2004) 34 HKLJ 245; and *Time for Change: A Call for the Legal Recognition of Transsexual and other Transgender Persons in Hong Kong* (2004) 34 HKLJ 515.

2.3 Applicant's case

38. The applicant was born in Hong Kong and is a Hong Kong permanent resident. At birth, she was classified and registered as a male. There is no dispute that biologically speaking, the classification was correct. The applicant's Hong Kong juvenile identity card as well as Hong Kong permanent identity card (including replacement cards) up to 2008, all described her as a male.

39. However, from an early age, the applicant felt that she was a female. Between 2005 and 2008, she received psychiatric assessment, ongoing assessment as well as hormonal treatment from public hospitals

and clinics. In January 2007, the applicant underwent a surgical orchidectomy procedure in Thailand to remove her testes.

40. In the same year, the applicant changed her name to a more feminine one by a deed poll.

41. The applicant also underwent successfully a period of "real life experience", a process where she lived in her preferred gender role as a woman. After further psychiatric assessment by government doctors, the applicant was recommended to undergo a sex reassignment surgery.

42. In 2008, the applicant underwent a sex reassignment surgery at the Ruttonjee and Tang Shiu Kin Hospitals. The operation was a success. Dr Yuen Wai Cheung of the hospital issued an official letter to certify that the applicant had undergone male-to-female transsexual surgery in the hospital and her "gender should now be changed to FEMALE".

43. Shortly thereafter, the applicant successfully applied to the education institution in which she had studied to change her gender to "female" in all records.

44. Moreover, in August 2008, the applicant applied to amend the registered particulars of her Hong Kong permanent identity card by changing her name and sex (from male to female). The application was approved pursuant to regulation 18 of the Registration of Persons Regulations (Cap 177A). On 1 September 2008, the applicant was issued

with a replacement identity card which indicated her new name and sex (female).

45. The applicant also applied to alter the sex entry on her birth certificate, but the application was refused. The refusal is not challenged in these proceedings.

46. The applicant has been dressing and living as a woman, and post-operatively, she has been having a body which has the physical appearance of a woman. She has developed a relationship with a man, and wishes to marry him. However, her enquiries through solicitors with the Marriage Registry regarding her capacity to marry a man have been met with the answer that for the purposes of the law of marriage in Hong Kong, which does not allow same sex marriage, men and women are determined according to their biological sex at birth which cannot be changed subsequently. In short, despite the successful completion of the relevant sex reassignment surgery and the medical certificate issued by Dr Yuen of a public hospital certifying that her gender is now female, the applicant finds herself unable to marry the man she wants to marry, or indeed any man at all.

2.4 Legal proceedings

47. On 28 October 2009, the applicant sought leave to apply for judicial review to challenge the refusal of the Registrar of Marriages contained in a letter dated 26 November 2008 to allow her to register her marriage with her male partner in accordance with the provisions of the Marriage Ordinance (Cap 181). On 5 November 2009, the Court granted

an extension of time to the applicant to apply for leave to apply for judicial review, and granted her leave to apply for judicial review accordingly.

48. In essence, the applicant asks the Court to quash the decision of the Registrar of Marriages refusing her application to marry her male partner. She seeks a declaration that the Registrar has misconstrued sections 21 and 40 of the Marriage Ordinance in that he has wrongly regarded the applicant as a man instead of a woman for the purposes of the provisions. Alternatively, if, contrary to her first contention, the Registrar has not misinterpreted the provisions, the applicant seeks a declaration that the relevant provisions of the Marriage Ordinance, insofar as they do not recognise any post-operative male-to-female transsexual as a "female" or a "woman" under any circumstances, are inconsistent with article 37 of the Basic Law and/or articles 14 and 19(2) of the Hong Kong Bill of Rights (ie articles 17 and 23(2) of the International Covenant on Civil and Political Rights 1966 (ICCPR)), and are unconstitutional. On that alternative footing, the applicant also seeks a declaration that the Registrar's decision to refuse her application to marry her male partner was unlawful because it was made on the basis of sections 21 and 40 of the Ordinance, which are, the applicant claims, unconstitutional to the extent indicated.

3 THE LAW

3.1 Hong Kong's statutory provisions

49. It is necessary to give a brief description of the relevant statutory provisions and case law.

50. In Hong Kong, marriage is essentially governed by the Marriage Ordinance. The preamble of the Ordinance says that the Ordinance is to provide for "the celebration of Christian marriage or the civil equivalent thereof, and for matters connected therewith".

51. Section 40 gives full expression to this theme:

> "(1) Every marriage under this Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage.
>
> (2) The expression "Christian marriage or the civil equivalent of a Christian marriage" implies a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others."

52. Section 20 of the Ordinance stipulates, amongst other things, how the Registrar or a civil celebrant shall celebrate a marriage. The words of celebration required to be used proceed on the footing that a marriage is to be between a male and a female respectively.

53. Furthermore, section 20(1)(d) of the Matrimonial Causes Ordinance (Cap 179) which I will return to, provides expressly that a marriage which takes place after 30 June 1972 shall be void on the ground that "the parties are not respectively male and female".

54. There is, however, no relevant definition of "man", "woman", "male" or "female" in either of the Ordinances. The matter is therefore left to the interpretation of the court.

3.2 Pre-Corbett case law

55. The first UK and Commonwealth authority directly on the point was the decision of Ormrod J (as he then was) in *Corbett v Corbett* (*otherwise Ashley*) [1971] P 83, decided on 2 February 1970. However, there were at least two earlier cases decided elsewhere, which touched on the same point. In *Re Leber*, Neuchatel Cantonal Court, 2 July 1945, a Swiss decision decided a quarter of a century before *Corbett*, a post-operative male-to-female transsexual applied, in substance, to change her sex as recorded on the birth register from male to female. The Swiss Cantonal Court granted her application, commenting that the applicant, being neither a perfect man nor a perfect woman, had to be placed in a category of human beings which she most resembled. The Court borne in mind the unanimous opinion of doctors and experts that the applicant was nearest, as a whole, to a woman. The Court did not consider that the interest of public order and morality were opposed to the personal interest which urged the applicant to ask for a change of civil status. See the discussion of the case in *Kevin v Attorney-General* (*Cth*) (2001) 165 FLR 404, paras 112 to 115 (Chisholm J). However, it should be noted that *Re Leber* was not directly concerned with the right to marry in the acquired sex.

56. The other earlier case was the US case of *In re Anonymous* 293 NYS 2d 834 (1968). Decided shortly before *Corbett*, the case involved a post-operative transsexual who sought to change his name. Judge Pecora rejected the suggestion that there is some middle ground between the sexes, a "no-man's land" for those individuals who are neither truly "male" nor truly "female". He adopted this formula to determine a person's sex (at p 837):

> "… Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonised, then the social sex or gender of the individual should be made to conform to the harmonised status of the individual and, if such conformity requires changes of a statistical nature, then such changes should be made. Of course, such changes should be made only in those cases where physiological orientation is complete."

The judge refused to determine a person's sex identity by reference only to the results of mere histological section or biochemical analysis, with a complete disregard for the human brain, "the organ responsible for most functions and reactions, many so exquisite in nature, including sexual orientation" (p 838).

57. However, again it should be noted that *In re Anonymous* was not a case directly concerned with the right to marry.

3.3 Ormrod J's decision in Corbett

58. In *Corbett*, Ormrod J was asked by a husband to grant a declaration that the marriage was null and void or alternatively a decree of nullity, on the ground that his "wife" was in fact a post-operative male-to-female transsexual person, who was, as a matter of law, a man. The husband further argued that the "wife" was incapable of consummating a marriage (because she only had an artificial vagina).

59. Based on the medical evidence presented before the Court, Ormrod J recognised there were at least four criteria for assessing the sex identity of an individual: (1) chromosomal factors; (2) gonadal factors (ie presence or absence of testes or ovaries); (3) genital factors (including

internal sex organs); and (4) psychological factors. Some of the expert witnesses in the case would add (5) hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc) (p 100 D-F).

60. However, the learned judge held that for marriage purposes, only biological criteria, that is to say, the first three criteria described above, should be taken into account. The decision was based on the view that in marriage, the capacity for natural heterosexual intercourse is an essential element:

> "… sex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural hetero-sexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex. …
>
> … The question then becomes, what is meant by the word "woman" in the context of a marriage, for I am not concerned to determine the "legal sex" of the respondent at large. Having regard to the essentially hetero-sexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia, cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt in the first place, the first three of the doctors' criteria, i.e., the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention." (pp 105G/H-106D/E)

61. The Court added that if necessary, it would be prepared to hold that the "wife" was physically incapable of consummating a marriage

because she did not have a natural vagina: at p 107F-G/H. The Court therefore held that the "wife" was in fact a man, and granted a decree of nullity declaring that the marriage in question was void *ab initio*.

3.4 Reception of Corbett in UK

62. The landmark decision of Ormrod J is generally regarded as having been given statutory recognition by Parliament when it enacted section 1(c) of the Nullity of Marriage Act 1971 which was re-enacted as section 11(c) of the Matrimonial Causes Act 1973: *Bellinger v Bellinger* [2002] Fam 150, paras 16-17 (CA); *J v C* [2007] Fam 1, para 29; *Attorney-General (Cth) v "Kevin and Jennifer"* (2003) 172 FLR 300, para 292. The subsection provides that a marriage which takes place after the commencement of the Act shall be void on the ground that "the parties are not respectively male and female". It may be remembered that this subsection is exactly the same as section 20(1)(d) of our Matrimonial Causes Ordinance. Indeed the latter subsection was added to the local Ordinance by section 12 of the Matrimonial Causes (Amendment) (No 2) Ordinance (Ord No 33 of 1972). At the second reading of the Bill and in the Explanatory Memorandum, it was expressly stated that the amendment was made to adopt the corresponding provisions in the Nullity of Marriage Act 1971.

63. *Corbett* was followed in England in *R v Tan* [1983] QB 1053, a case concerning the offence of living on the earnings of a prostitute which can only be committed by a man. The Court of Appeal took the view that "both common sense and the desirability of certainty and consistency" demanded the *Corbett* test to be applied for the purposes not

only of marriage but also of a criminal charge under the relevant statutory provisions.

64. Likewise in *Re P and G* (*Transsexuals*) [1996] 2 FLR 90, the English Divisional Court dismissed an application for judicial review of decisions by the Registrar General refusing to alter entries on the register of birth which recorded the sex of the applicants as "boy" after the applicants had undergone gender reassignment surgeries. The Court maintained the *Corbett* test for determining sex.

3.5 Reception of Corbett overseas

65. Overseas, the reception of *Corbett* was mixed. It was followed in a number of cases and some courts arrived at a similar conclusion independently: *B v B* 355 NYS 2d 712 (1974) (New York); *Re T* [1975] 2 NZLR 449 (New Zealand); *W v W* 1976 (2) SA 308 (South Africa); *Ulane v Eastern Airlines Inc* 742 F 2d 1081 (1984) (US Court of Appeals, 7th Circuit); *M v M (A)* (1984) 42 RFL (2d) 55 (Prince Edward Island); *In re Ladrach* 513 NE 2d 828 (1987) (Ohio); *Lim Ying v Hiok Kian Ming Eric* [1992] 1 SLR 184 (Singapore); *Littleton v Prange* 9 SW 3d 223 (1999) (Texas); *In the matter of the Estate of Gardiner* 42 P 3d 120 (2002) (Kansas); *In re Application for Marriage License for Nash* 2003 WL 23097095 (Ohio App 11 Dist) (Ohio); *Kantaras v Kantaras* 884 So 2d 155 (2004) (Florida); and *Rommel Jacinto Dantes Silverio v Republic of the Philippines*, GR No 174689 (22 October 2007) (the Philippines).

66. Thus, for instance, in *Littleton v Prange* (1999), the Court of Appeals of Texas had to decide whether a post-operative male-to-female

transsexual was a "surviving spouse" of a deceased man whom she had "married" for the purposes of bringing a medical malpractice action. After reviewing *Corbett* and other US cases, the Court held that the purported marriage was invalid and the transsexual woman lacked standing to bring claim as the man's surviving spouse under wrongful death and survival statutes. Having described the transsexual woman's female anatomy as "all man-made" and the body she inhabited "a male body in all aspects other than what the physicians [had] supplied" (p 231), Hardberger CJ went on to say (*ibid*):

> "We recognize that there are many fine metaphysical arguments lurking about here involving desire and being, the essence of life and the power of mind over physics. But courts are wise not to wander too far into the misty fields of sociological philosophy. Matters of the heart do not always fit neatly within the narrowly defined perimeters of statutes, or even existing social mores. Such matters though are beyond this court's consideration. Our mandate is, as the court recognized in *Ladrach*, to interpret the statutes of the state and prior judicial decisions. … There are some things we cannot will into being. They just are."

67. However, *Corbett* was not followed in jurisdictions including Australia and New Zealand. Some US cases also came to a different conclusion from *Corbett*, whether after referring to *Corbett* or not.

68. In New Zealand, Ellis J in *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 refused to follow *Corbett* and decided that a post-operative transsexual person should be allowed to marry in his or her desired sex. What matter is not the transsexual person's ability to function sexually – "Where two persons present themselves as having the apparent genitals of a man or a woman, they should not have to establish that each can function sexually" (p 607). See also *M v M* [1991] 1 NZFLR 337.

69. Likewise in Australia, Chisholm J in *Kevin, supra*, arrived at the same result. Scholarly written, the judgment subjected the reasoning of Ormrod J in *Corbett* to minute examination and vigorous criticism: paras 70 to 121. The judge held that sex, for the purposes of marriage, should be determined by considering all relevant matters. These matters included the person's biological and physical characteristics at birth; the person's life experiences, including the sex in which he or she was brought up and the person's attitude to it; the person's self perception as a man or woman; the extent to which the person had functioned in society as a man or a woman; any hormonal, surgical or other medical sex reassignment treatments the person had undergone, and the consequences of such treatment; and the person's biological, psychological and physical characteristics at the time of marriage, including (if they could be identified) any biological features of the person's brain that were associated with a particular sex (para 329). Applying the new test, Chisholm J found the post-operative transsexual man involved in the case (Kevin) was indeed a "man" for the purposes of marriage and granted a declaration of the validity of the marriage between the transsexual man and a woman (Jennifer).

70. On appeal (– the case became known as "*Kevin and Jennifer*", *supra*), the Full Court of the Family Court of Australia affirmed the decision of Chisholm J. The Full Court rejected *Corbett*'s holding that whether a person is a man or a woman for the purposes of marriage law is to be determined by reference to circumstances at the time of birth only. Giving the words "man" and "woman" in the law of marriage their ordinary contemporary meanings according to Australian usage, the Court found that they included post-operative transsexuals as men or women in accordance with their sexual reassignment.

71. It is fair to say that the respective decisions of Chisholm J and the Full Court of the Family Court were considerably influenced by earlier Australian decisions involving the same issue but in different contexts. They involved criminal law, social security law and anti-discrimination law. The leading decisions were *R v Harris and McGuiness* (1988) 17 NSWLR 158 (each accused was charged with an offence that, being a male person, he committed an act of indecency with another male – the offence could only be committed by a male person); *Secretary, Department of Social Security v SRA* (1993) 43 FCR 299 (the case involved the interpretation of some social security legislation). In all these decisions, the Australian courts recognised the change of sex where the person had gone through the complete medical procedures. See the discussion of these decisions by Chisholm J in *Kevin*, paras 137 to 159.

72. There are also US cases which did not reach the same conclusion as *Corbett* but recognised the change of sex. Notable amongst them was *MT v JT* 355 A 2d 204 (1976) where the New Jersey Superior Court, Appellate Division, rejected *Corbett* and, relying on the medical evidence available, held that where a post-operative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female, the post-operative acquired sex of the transsexual person should be recognised for the purposes of marriage.

3.6 Pre-2002 position of the European Court of Human Rights

73. The United Kingdom's application of the *Corbett* criteria and the resulting non-recognition of change of gender of post-operative transsexual persons came before the European Court of Human Rights on

no less than four occasions in the last two decades of the 20th century. On all four occasions, the European Court held that there was no violation of article 8 (right to respect for private and family life) or article 12 (right to marry) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950: *Rees v United Kingdom* (1987) 9 EHRR 56; *Cossey v United Kingdom* (1990) 13 EHRR 622; *X, Y and Z v United Kingdom* (1997) 24 EHRR 143 and *Sheffield and Horsham v United Kingdom* (1999) 27 EHRR 163. The European Court declined to interfere with the United Kingdom's practice on account of the absence of a generally shared approach among the Contracting States and of the margin of appreciation that it accorded to the United Kingdom.

3.7 Bellinger v Bellinger (CA)

74. Returning to domestic law development in the United Kingdom, both Johnson J and the majority of the Court of Appeal in *Bellinger v Bellinger*, *supra*, continued to adhere to the *Corbett* criteria. However, no new justification for supporting the *Corbett* criteria was advanced by any of the judges involved. In the Court of Appeal, importantly, the majority (Butler-Sloss P and Robert Walker LJ) pointed out that legal recognition of marriage is a matter of status and is not for the spouses alone to decide; it affects society and is a question of public policy for Parliament (para 99).

75. Thorpe LJ, dissenting, subjected Ormrod J's reasoning in *Corbett* to a detailed analysis and concluded that the foundations of Ormrod J's judgment were "no longer secure" (para 133). He accepted that judges must not usurp the function of Parliament; however, he took

the view that Parliament intended "some judicial licence" in the area in question given the absence of any relevant definition within the statute (para 148). The judge took into account the major social developments that had occurred after *Corbett* was decided, including changes to the institution of marriage over the preceding 30 years and "the highly significant developments" throughout Europe since the year 1970 toward recognising the assigned sex of a post-operative transsexual person (para 156), and eventually concluded that a post-operative transsexual may marry in his or her preferred gender role.

3.8 *Goodwin*

76. Before *Bellinger* reached the House of Lords, the European Court of Human Rights decided the case of *Goodwin v United Kingdom* (2002) 35 EHRR 447. The case involved a United Kingdom citizen who was a post-operative male-to-female transsexual. Although domestic law permitted the applicant to change her name, she was unable to change a number of official government records which listed her as male. That affected her position in relation to social security, national insurance, pensions and retirement age. She alleged that the failure to amend her official records constituted a violation of, amongst other things, her rights under articles 8 and 12 of the European Convention.

77. The European Court, departing from its previous jurisprudence as described, unanimously held that there were violations of articles 8 and 12. In particular, in relation to article 12 (right to marry and to found a family), the Court, reviewing the situation in 2002, observed that article 12 secures the fundamental right of a man or woman to marry

and to found a family. The second aspect (to found a family) is not however a condition of the first (to marry) and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of the provision (para 98). The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but, the European Court held, "the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired" (para 99).

78. Commenting on the *Corbett* criteria, the European Court was not persuaded that at the date of the case "it [could] still be assumed that the right of a man and woman to marry must refer to a determination of gender by purely biological criteria" (para 100).

79. The European Court noted that there had been major social changes in the institution of marriage since the adoption of the Convention as well as drastic changes brought about by developments in medicine and science in the field of transsexuality. Apart from biological factors, there are other important factors, such as the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender, which should all be taken into account in determining a person's sex for the law of marriage (para 100). The European Court also noted that the Charter of Fundamental Rights of the European Union departs, "no doubt deliberately", from the wording of

article 12 of the Convention in removing the reference to men and women when referring to the right to marry and the right to found a family (para 100).

80. The European Court found that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The Court observed that the applicant in the case "[lived] as a woman, [was] in a relationship with a man and would only wish to marry a man. She [had] no possibility of doing so". In the Court's view, she might therefore claim that the very essence of her right to marry had been infringed (para 101).

81. The Court therefore concluded that while it is for a Contracting State to determine the conditions under which a person claiming legal recognition as a transsexual establishes that gender reassignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), there is "no justification for barring the transsexual from enjoying the right to marry under any circumstances" (para 103).

3.9 Bellinger in the House of Lords

82. In the light of this ground-breaking decision, the appellant in *Bellinger v Bellinger* added an alternative claim for a declaration that section 11(c) of the Matrimonial Causes Act 1973 (ie section 20(1)(d) of our Matrimonial Causes Ordinance) was incompatible with articles 8 and

12 of the European Convention (which had been given domestic effect by the Human Rights Act 1998).

83. The House of Lords ([2003] 2 AC 467) therefore faced issues similar to that the Court now faces in the present proceedings. First, whether as a matter of statutory interpretation of the relevant provisions governing marriage in the United Kingdom, "male" and "female" should be interpreted by reference to the *Corbett* criteria. Secondly, if the answer was in the affirmative, whether the relevant provisions were incompatible with the Convention rights in question.

84. Lord Nicholls, delivering the lead judgment, reviewed summarily the case law and legal developments since *Corbett*, both domestically and overseas. The judge took into account the latest Strasbourg jurisprudence. His Lordship also noted that after *Goodwin*, the Interdepartmental Working Group on Transsexual People had been reconvened by the UK Government, and the Working Group had been asked to consider urgently the implications of the *Goodwin* judgment. Secondly, the judge further noted that on 13 December 2002, the Government announced its intention to bring forward primary legislation which would allow transsexual people who could demonstrate that they had taken decisive steps towards living fully and permanently in the acquired gender to marry in that gender. A draft bill would be published in due course.

85. On the first interpretative question, Lord Nicholls did not advance any further reasons to justify the decision of Ormrod J in *Corbett*. Rather, he took "the present state of English law" regarding the sex of

transsexual people as that represented by Ormrod J's decision (para 11). His Lordship then proceeded to consider whether the law should be changed to take into account the changes that had happened since the decision in *Corbett* was made 30 years ago. He regarded recognising the appellant as female for the purposes of the law of marriage would necessitate giving the expression "male" and "female" in the Matrimonial Causes Act 1973 "a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex" (para 36). The judge considered that this would represent "a major change in the law, having far reaching ramifications" (para 37). It would raise issues whose solution would call for "extensive enquiry and the widest public consultation and discussion". Questions of social policy and administrative feasibility would arise at several points, and their interaction would have to be evaluated and balanced. His Lordship continued (at para 37):

> "The issues are all together ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject."

86. Lord Nicholls elaborated on the issues that would be raised by a drastic change in the law. First, much uncertainty surrounded the circumstances in which gender assignment should be recognised for the purposes of marriage. In other words, how much would be sufficient for changing one's sex? By what criteria were cases to be decided? (paras 39 and 40)

87. But the problem, the learned judge noted, was more fundamental than that. For it was questionable whether the successful completion of some sort of surgical intervention should be an essential prerequisite to the recognition of gender reassignment (para 41). As one medical report had expressed it, "a male-to-female transsexual person is no less a woman for not having had surgery, or any more a woman for having had it": see *SAR*, *supra*, at p 306. Yet marriage has legal consequences in many directions: for instance, housing and residential security of tenure, social security benefits, citizenship and immigration, taxation, pensions, inheritance, life insurance policies, criminal law (bigamy). "There must be an adequate degree of certainty"; if it were otherwise, the application of the law would be in a state of "complete confusion" (para 42). Yet where the line should be drawn was far from self-evident (para 43).

88. Secondly, his Lordship pointed out that the recognition of gender reassignment for the purposes of marriage was part of a wider problem which should be considered as a whole and not dealt with in a piecemeal fashion. Other relevant areas included education, child care, occupational qualifications, criminal law (gender specific offences), prison regulations, sport, the needs of decency, and birth certificates (para 45).

89. Thirdly, in the context of marriage, the challenge posed by post-operative transsexual individuals was just part of a larger issue involving marriage as an institution, and raised the question of same sex marriage, which would involve "a fundamental change in the traditional concept of marriage" (paras 46 to 48).

90. For all these reasons, his Lordship, with whose judgment the other Law Lords all agreed, refused to change the interpretation of the relevant statutory provisions and thus declined to declare the marriage concerned valid.

91. However, on the alternative claim of the appellant, given the decision of the European Court in *Goodwin*, which the Government did not dispute before the House of Lords in *Bellinger*, Lord Nicholls concluded that a declaration of incompatibility of section 11(c) of the Matrimonial Causes Act 1973 with articles 8 and 12 of the European Convention should be made.

92. In his concurring judgment, Lord Hope emphasized that the words "male" and "female" in section 11(c) of the 1973 Act are not technical terms and that they must be given their ordinary, everyday meaning in the English language. However, the judge pointed out that there was no evidence before the House to suggest that in contemporary usage in the United Kingdom, on whichever date one might wish to select, these words could be taken to include post-operative transsexual persons. After referring to the dictionary meanings of the words "male" and "transsexual", the judge observed: "The fact is that the ordinary meaning of the word "male" is incapable, without more, of accommodating the transsexual person within its scope" (para 62).

3.10 Gender Recognition Act 2004

93. Parliament in the United Kingdom duly passed the Gender Recognition Act 2004, which allows a person suffering from gender

dysphoria who has undergone or is undergoing treatment for the purpose of modifying sexual characteristics to apply for a full or interim gender recognition certificate upon satisfaction of various statutory requirements. The application for change of gender is to be dealt with by a gender recognition panel set up under the Act. If an applicant is already married, only an interim certificate is issued. However, if the applicant is single or is divorced, the certificate to be issued is a full gender recognition certificate. Likewise, if the previously married interim certificate-holder has subsequently obtained a divorce, his or her interim certificate may be changed to a full certificate. Section 9(1) of the Act provides that where a full gender recognition certificate is issued to a person, the person's gender becomes the acquired gender "for all purposes".

3.11 Civil Partnership Act 2004

94. To complete the picture, in the same year, Parliament also passed the Civil Partnership Act 2004 to enable same-sex couples to obtain legal recognition of their relationship by forming a civil partnership with rights and responsibilities identical to civil marriage. Civil partners, after formal registration, are entitled to the same legal rights as those granted to married couples. They include employment benefits, tax credits, child support and other income benefits; state and occupational pensions for both partners; parental responsibility for the other partner's child if applied for; tenancy agreements; responsibility regarding maintenance for children; the same tax rules that are applicable to married couples; next of kin rights when visiting a partner in hospital; and recognition of life assurance policies. There is also a formal process for dissolving partnerships akin to divorce.

3.12 International scene after Goodwin

95. Given these new legislations, the UK Government has been successful in defending subsequent challenges before the European Court of Human Rights regarding its continued ban on same sex marriage: *Parry v The United Kingdom (dec)*, No 42971/05, ECHR 2006-XV; *R and F v The United Kingdom (dec)*, No 35748/05, 28 November 2006. A similar challenge against the Government of Austria was recently rejected by the European Court in *Schalk and Kopf v Austria*, No 30141/04, 24 June 2010. The European Court reconfirmed the traditional view that marriage is "a union between partners of different sex" (para 55).

96. Even before *Goodwin*, a survey conducted by Liberty, a UK human rights organisation, found that 54% of the Contracting States of the European Convention permitted post-operative transsexuals to marry those of the opposite sex to their assigned gender and 14% did not: see *Goodwin*, at para 57. According to the materials before the Court, because of *Goodwin*, all 47 Member States of the Council of Europe are now required to give full legal recognition to a change of gender and to respect the right to marry of a post-operative transsexual person in his or her assigned gender role.

97. In the United States, the vast majority of States and the District of Columbia now have statutes expressly permitting a person who has undergone a change in gender to have his or her birth certificate amended to reflect the change. Only three States expressly forbid it.

98. Post-operative transsexuals' new gender are also statutorily recognised in Canada, South Africa and Israel: see *Goodwin*, at para 56.

99. In Brazil, a decision of the Superior Court of Justice in October 2009 required the State to change the birth certificate of an individual who had undergone gender reassignment surgery. In Argentina, individuals are allowed to change their sex on their birth certificates and identity documents. In Uruguay, legislation permits individuals to change their sex on their birth certificates.

100. As already mentioned, both Australia and New Zealand permit a post-operative transsexual to marry in his or her acquired gender.

101. In Asia, some countries have followed the same pattern. In Japan, the Gender Identity Disorder Law permits individuals who have had gender reassignment surgery to legally change their gender and to marry in their new gender.

102. In both South Korea and Malaysia, there are case law allowing a post-operative transsexual person to legally change the sex recorded on the family register and on the identity card respectively: *In re Change of Name and Correction of Family Register*, Supreme Court of South Korea, 22 June 2006; *JG v Pengarah Jabatan Pendaftaran Negara* 366 Malayan LJ 1 (not following *Wong Chiou Yong (p) v Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara* (2005) 2 AMR 415).

103. Lastly, on the Mainland and in Taiwan, as well as in Singapore, a post-operative transsexual individual is allowed to marry in his or her assigned gender. Douglas Sanders, *Document Change for Transsexuals in Asia* (9 August 2010).

4 1ST ISSUE: STATUTORY INTERPRETATION

4.1 The issue

104. I now move on to deal with the first ground of challenge relied on by the applicant.

105. It is the applicant's case that on the proper interpretation of section 40(2) of the Marriage Ordinance, the words "man" and "woman" include a post-operative transsexual individual in his or her acquired sex. The words "male" and "female" in section 21 of the Marriage Ordinance and in section 20(1)(d) of the Matrimonial Causes Ordinance should be similarly construed.

4.2 Principles of statutory interpretation

106. This is essentially a question of statutory interpretation. As the Court of Final Appeal has pointed out repeatedly, a court must adopt a purposive approach in interpreting laws. The court's task is to ascertain the intention of the legislature as expressed in the language of the statute. The statutory language is construed, having regard to its context and purpose. Words are given their natural and ordinary meaning unless the context or purpose points to a different meaning. Importantly, context and purpose are considered when interpreting the words used and not when an ambiguity may be thought to arise. Context and purpose must be considered in the first instance, especially in the case of general words, and not merely at some subsequent stage when ambiguity may be thought to arise. Indeed, the mischief rule is an example of the purposive approach, which is reflected in Hong Kong in section 19 of the Interpretation and General Clauses Ordinance (Cap 1). The context of a statutory provision

should be taken in its widest sense and certainly includes the other provisions of the statute and the existing state of the law. The purpose of a statutory provision may be evidenced from the provision itself. Where relevant, materials such as a law reform commission report, the explanatory memorandum to the bill, and a statement made by the responsible official of the Government in relation to the bill in the Legislative Council may be referred to and used in order to identify the purpose of the legislation. *HKSAR v Cheung Kun Yin* [2009] 6 HKC 22, paras 11 to 14; *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, para 63; *HKSAR v Ho Yau Yin* [2010] 4 HKC 160, para 14.

107. On the other hand, whilst purpose and context are of great significance in the proper interpretation of a statute, it does not mean that one can distort or even ignore the plain meaning of the text and construe the statute in whatever manner that achieves a result which is considered desirable. As Lord Millett NPJ has reminded the courts in *China Field Ltd v Appeal Tribunal (Buildings) (No 2)* (2009) 12 HKCFAR 342, para 36, purposive construction means only that statutory provisions are to be interpreted to give effect to the intention of the legislature, and that intention must be ascertained by proper application of the interpretative process. This does not permit a court to attribute to a statutory provision a meaning which the language of the statute, understood in the light of its context and the statutory purpose, is incapable of bearing.

108. Bearing these general principles in mind, I would approach the question of statutory interpretation from various perspectives.

4.3 Purpose

109. First, the purpose of the Ordinance. The Marriage Ordinance was first enacted as Ordinance No 14 of 1875. According to its preamble, the Ordinance is to provide for the celebration of Christian marriage or the civil equivalent thereof, and for matters connected therewith.

110. There can be no doubt that marriage is an important and indeed foundational institution in most if not all civilised societies. It is, or was, at least until recent times, the institution on which family is founded. It is, first and foremost, a social institution greatly affected by a society's culture, history and traditions. It is also a legal institution in the sense that in all civilised societies, marriage is governed by law.

111. Thus described, it is, generally speaking, correct to view our own Marriage Ordinance as a piece of legislation to recognise, regulate and restrict marriages in our society. It recognises the institution of marriage in our society. It gives marriage legal recognition. The Ordinance, together with other relevant laws, confer on those who are married and their offspring, as well as the families that they have founded, legal status, rights, interests and obligations.

112. The Ordinance regulates how a legal marriage is to be contracted in Hong Kong. In the past, it used to be the case that a marriage contracted under the Ordinance (called a "registry marriage") was just one of three recognised ways of contracting a legal marriage in Hong Kong; the other two types of marriage possible were Chinese customary marriage (including concubinage) and Chinese modern marriage. However, after the great reforms in 1970/1971, registry marriage in accordance with the

Ordinance is now the only way to contract a legal marriage in Hong Kong. The Ordinance regulates how a marriage is to be celebrated. See generally *Leung Lai Fong v Ho Sin Ying* (2009) 12 HKCFAR 581, paras 22-23; Pegg, *Family Law in Hong Kong* (3rd ed), Chap 1.

113. This leads to my third point, namely, restriction. By that, I mean the Ordinance defines not only the formal, but also the substantive requirements for contracting a valid marriage. In particular, it prohibits polygamous or potentially polygamous marriages. It requires not only an open ceremony, but also registration. Most importantly for our present purposes, it requires that marriage be the union of one man and one woman; in other words, same sex marriage is prohibited.

4.4 Context

114. As far as context is concerned, the enactment of the Marriage Ordinance in the mid-19th century in Hong Kong is entirely understandable. The introduction of Christian marriage or its civil equivalent into Hong Kong at a time when it was a British colony is particularly natural given that otherwise, in those days, marriages were mostly conducted according to Chinese customary law. In the early 20th century, after the introduction of the Civil Code 1930 on the Mainland by the then Nationalist Government, people in Hong Kong began to contract marriages in accordance with the marriage provisions contained in the Code, and those marriages, when contracted in Hong Kong (which was, of course, outside the scope of application of the Civil Code), became known as "Chinese modern marriages". A Chinese modern marriage did not require registration but only an open ceremony. Unlike a Chinese customary

marriage, which was potentially polygamous in nature, a Chinese modern marriage was monogamous in nature. It was by law recognised as a valid marriage in Hong Kong: Marriage Reform Ordinance (Cap 178), s 8. As mentioned, the great reforms in 1970/1971 did away with both Chinese customary marriage and Chinese modern marriage.

115. As regards registry marriage under the Marriage Ordinance, given the historical context, it is again not surprising that it was modelled essentially on the law of marriage in the United Kingdom, of which Hong Kong was a colony. The emphasis on Christian marriage or its civil equivalent is therefore easy to appreciate.

116. According to the doctrine of the Church of England, marriage is in its nature a union permanent and life-long, for better or for worse, till death them do part, of one man and one woman, to the exclusion of all others on either side, for the procreation and nurture of children, for the hallowing and right direction of the natural instincts and affections, and for the mutual society, help and comfort which the one ought to have of the other, both in prosperity and adversity: *Halsbury's Laws of England* (5th ed), Vol 72, para 1, citing Revised Canons Ecclesiastical, Canon B30 para 1. The 19th century case of *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130 gave a shorter definition of Christian marriage, a definition adopted in section 40(2) of the Marriage Ordinance, that is to say, "the voluntary union for life of one man and one woman, to the exclusion of all others" (p 133). Whilst this shorter definition does not, by comparison, expressly refer to procreation, the traditional significance of procreation in Christian marriage, when viewed in the relevant religious and historical

context, cannot be doubted. And procreation is, by definition, a matter for members of the opposite biological sex.

4.5 Statutory recognition of Corbett

117. This natural heterosexual aspect of Christian marriage (and its civil equivalent) is fully evidenced by the express references to "man", "woman", "male" and "female" in section 40(2) and section 21 of the Ordinance. Moreover, as described, section 20(1)(d) of the Matrimonial Causes Ordinance provides that a marriage shall be void if the parties are not "respectively male and female". The subsection is based on the equivalent section 1(c) of the Nullity of Marriage Act 1971, which was re-enacted as section 11(c) of the Matrimonial Causes Act 1973. As mentioned, section 1(c) of the Nullity of Marriage Act 1971 is generally regarded as a provision which gave effect and statutory recognition to the decision of Ormrod J in *Corbett.* It is true that Thorpe LJ in *Bellinger* (CA), at paras 142 to 143, sought to suggest otherwise. However, not only was that not the general view, but in a subsequent case, namely, *J v C, supra*, the judge actually agreed with the judgment of Wall LJ (para 51), who said (in para 29) that section 11(c) of the Matrimonial Causes Act 1973 "simply gives statutory expression to the decision reached by Ormrod J in *Corbett*". Moreover, although a similar attempt to suggest otherwise was made before the House of Lords in *Bellinger* (at p 469F to G), the House of Lords plainly did not accept that it was the case. Rather, the House expressly proceeded on the basis that Ormrod J's interpretation of the relevant provisions represented "the present state of English law" (para 11) and the question before the House was therefore whether to change that state of the law by a judicial interpretative process.

118. In my view, it is quite plain that Ormrod J's interpretation of the relevant provisions has been given statutory recognition both in the United Kingdom and in Hong Kong. However, this is only a matter to be taken into account in the Court's interpretative task. Whilst regard must be had to the views of Parliament expressed at any particular time, ultimately, statutory interpretation is a matter for the courts, not Parliament (nor, in Hong Kong, the Legislature). *Cf Bennion on Statutory Interpretation* (5th ed), 708-711 (use of later Acts in *pari materia* and "tacit legislation").

4.6 Corbett represents the present state of the law (subject to possible change)

119. So far as the courts are concerned, they have spoken. Ormrod J in *Corbett* gave the relevant provisions an interpretation. That interpretation was repeatedly adopted in English cases. The House of Lords in *Bellinger* clearly treated *Corbett* as representing the pre-existing state of English law. Lord Nicholls said (at para 11):

> "The present state of English law regarding the sex of transsexual people is represented by the well-known decision of Ormrod J in *Corbett*."

120. Proceeding on that footing, the Law Lords then considered whether the pre-existing state of the law should be changed. That was also the analysis of the English position by Chisholm J in *Kevin*, at para 183. There, the learned judge pointed out that in *England* the law had been established, and the essential question in *Bellinger* was whether to change it. The judge went on to contrast that with the position in *Australia*, where the common law position had not yet been determined, and the Australian courts had a free hand in the matter.

121. Given the close resemblance between Hong Kong and the United Kingdom in terms of the law of marriage, and the close link between the common law in Hong Kong and the common law in England, at least prior to 1997, it is unrealistic to suggest that *Corbett* did not represent the state of Hong Kong law prior to 1997 or, that it does not represent the present state of the law here, subject to any possible change thereto.

122. In terms of the merits of the decision in *Corbett*, there is no point in repeating here the very detailed analysis and criticisms of Ormrod J's reasoning that appeared in some subsequent cases, notably those by Chisholm J in *Kevin* and by Thorpe LJ in *Bellinger* (CA). It would appear that, to a significant extent, those criticisms have been made with the benefit of subsequent social changes as well as advances in medical science and surgical techniques. However, *if* one proceeds, as Ormrod J did, from the premise that marriage is a voluntary union between two individuals of opposite sex "for the procreation and nurture of children" – a function emphasized in Christian marriage, one simply cannot escape from the conclusion that the ability to engage in natural heterosexual intercourse is an essential feature of marriage.

123. I say this with full recognition that the law has always allowed people who are past their child bearing age to get married. Likewise, infertility is not by itself a ground for denying a person's right to marry. Yet, all these "exceptions" do not detract from the fact that the central theme of marriage, as is understood traditionally, is for the procreation of children. Lord Hope expressed this in the following terms in *Bellinger* (at para 64):

> " Of course, it is not given to every man or every woman to have, or to want to have, children. But the ability to reproduce one's own kind lies at the heart of all creation, and the single characteristic which invariably distinguishes the adult male from the adult female throughout the animal kingdom is the part which each sex plays in the act of reproduction. When Parliament used the words "male" and "female" in section 11(c) of the 1973 Act it must be taken to have used those words in the sense which they normally have when they are used to describe a person's sex, even though they are plainly capable of including men and women who happen to be infertile or are past the age of child bearing."

124. The fact that the law allows those who are unable or unwilling to procreate to get married can be easily explained by reference to society's history, traditional practice and culture. However, all these cases involve couples of the opposite biological sex. The case of transsexual people – in terms of *marriage* in their preferred sex, as opposed to other social or sexual practices – has not been so supported by traditions, custom or societal practice either in the United Kingdom or in Hong Kong.

125. For all those reasons, subject to what I would later say about social changes and scientific advances that have taken place in the past 40 years since *Corbett* was decided, and thus whether the law should be changed accordingly, I take the view that *Corbett* does represent the present state of the law in Hong Kong.

4.7 Updating construction: should the law be "changed"?

126. However, this is not by itself determinative of the first interpretative question. Like the House of Lords in *Bellinger*, the next question is whether the law should be "changed". Of course, statutory law cannot be "changed" by a court. What is actually meant is whether the

Court should now give the provisions under interpretation a different meaning from that given before. That this is permissible, within bounds, cannot be doubted.

127. As *Bennion*, *op cit*, at pp 889 to 914, has explained in some detail, in the usual case, an Act of Parliament is presumed to be intended to develop in meaning with developing circumstances; such an Act is called an "ongoing Act". It is only in the comparatively rare case that Parliament intends an Act to be of unchanging effect ("a fixed-time Act"). To an ongoing Act, an "updating construction" must be given. In other words, it is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed. While it remains law, it is to be treated as "always speaking". This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law. However, there is a limit to what an updating construction can do. What is not permitted is to alter the meaning of the words used in the enactment in ways which do not fall within the principles originally envisaged by the enactment. See for instance, *MacDonald v Advocate General for Scotland* [2004] 1 All ER 339 ("sex discrimination" cannot be interpreted to mean "sexual orientation discrimination"). As Lord Bingham explained in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, para 9:

> "There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now."

128. The absence of any relevant definitions in the Ordinance itself or elsewhere would also support the view that the relevant provisions should be construed in the light of moral, ethical and societal values as they are now rather than as they were at the date of first enactment or subsequent amendment and that Parliament intended some judicial licence: Thorpe LJ in *Bellinger* (CA), para 148.

129. In considering whether the relevant provisions should be given an updating construction so as to include in the words "woman" and "female" a post-operative transsexual woman, it is necessary to consider what, if any, relevant changes there have been over the past 40 years since *Corbett* was decided.

4.8 Loss of prominence of procreation and other changes

130. In terms of the nature and purpose of marriage, certainly the emphasis on procreation has shifted. Lord Nicholls recognised this in *Bellinger*, at para 46, when he pointed out that there was a time when the reproductive functions of male and female were regarded as the primary *raison d'être* of marriage. "For a long time now the emphasis has been different", it was pointed out. Variously expressed, there is now much more emphasis on the "mutual society, help and comfort that the one ought to have of the other". Similar observations have been made elsewhere: see, for example, *Kevin and Jennifer*, paras 152-153.

131. In the Court of Appeal, Thorpe LJ had described the changes in these terms (at para 128):

> "But the world that engendered those classic definitions has long since gone. We live in a multi-racial, multi-faith society. The

> intervening 130 years have seen huge social and scientific changes. Adults live longer, infant mortality has been largely conquered, effective contraception is available to men and women as is sterilisation for men and women within marriage. Illegitimacy with its stigma has been legislated away: gone is any social condemnation of cohabitation in advance of or in place of marriage. Then marriage was terminated by death: for the vast majority of the population divorce was not an option. For those within whose reach it lay, it carried a considerable social stigma that did not evaporate until relatively recent times. Now more marriages are terminated by divorce than death. Divorce could be said without undue cynicism to be available on demand. These last changes are all reflected in the statistics establishing the relative decline in marriage and consequentially in the number of children born within marriage. Marriage has become a state into which and from which people choose to enter and exit. Thus I would now redefine marriage as a contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations."

132. In terms of medical advances, I have already set out the present day medical learning about the determination of sex and gender in general and the medically recognised condition of transsexualism in particular. I have also described that at least medically speaking, the biological indications at birth of a person's sex are but some of the factors to be taken into account in determining a person's sex or gender. The question of whether a person's sex at birth can be "changed subsequently" is, as Lord Nicholls recognised in paragraph 1 of his judgment in *Bellinger*, in itself question-begging, in that it raises the question of how and at what stage in life a person's sex is to be determined. The fact that for many practical purposes, a person at birth should be assigned with a sex does not, by itself, necessarily mean, whether as a matter of logic, legal reasoning or practical reality, that the assigned sex is inviolable or otherwise immutable for the rest of the person's life. I have also described, according to the latest medical learning, that transsexualism is not treatable in the sense that

the person's subjective belief and conviction cannot be changed by psychiatric, psychological or other treatment. In a confirmed case of transsexualism, it has been said, surgical intervention is not an option but a medically necessary treatment. Indeed in Hong Kong, as in many other developed countries, treatment of transsexual people is publicly funded in hospitals and clinics administered by the Hospital Authority. The standard therapeutic regimen, which culminates in a sex reassignment surgery, is all toward the same direction, that is to say, changing, to a varying extent, the body of the transsexual individual to conform to the sex he or she desires.

133. On the other hand, I note that unlike the position in Australia and New Zealand, non-consummation of marriage remains a ground to avoid a marriage: see section 20(2)(a) and (b) of the Matrimonial Causes Ordinance. However, as has been pointed out in *Otahuhu, supra*, at p 612 (para 4.7 of counsel's amended submissions, which Ellis J incorporated as part of his judgment), a marriage affected by non-consummation is still at its inception regarded as a valid subsisting marriage and the fact of non-consummation merely empowers one or other of the spouses to take steps, if they so wish, to have it brought to an end. A decree of nullity of a voidable marriage does not alter the previous status of the parties. They are still regarded in law as having been husband and wife before the decree was made absolute. See section 20B of the Matrimonial Causes Ordinance.

4.9 Ordinary usage of language

134. All this is no doubt relevant and must be borne in mind when considering what, if any, updating construction should be given to the relevant provisions in the Marriage Ordinance. However, interpretation is

ultimately a matter of construing the relevant text according to its plain meaning. Words used in a statute should be given their natural and ordinary meaning unless the context or purpose points to a different meaning. Here, one is concerned with the contemporary meaning and usage of the relevant words and text.

135. It is here that, in my view, the applicant's case on the first issue faces a difficult hurdle. That the contemporary usage and understanding of the relevant words are of great importance in the task of interpretation cannot be doubted. In the relevant UK, Australian and US cases that I have described, the contemporary usage of the relevant English words was all referred to as a significant matter in determining the relevant interpretation questions faced by the courts.

136. In *Kevin* (Chisholm J), paras 133 to 158; *Kevin and Jennifer* (Full Court of Family Court of Australia), paras 128 to 138; and notably, in the earlier case of *SRA*, pp 301 to 305 and 325 to 326, the Australian courts have been able to say that in the English language *as used in Australia*, the words "man" and "woman" (and "male" and "female") include respectively a post-operative transsexual man and a post-operative transsexual woman. However, this is apparently not so in the United Kingdom. Speaking in April 2003, Lord Hope specifically dealt with the everyday usage of the relevant words in the United Kingdom in the following terms (at para 62):

> " I need hardly say that I entirely agree with the Australian judges that the words "male" and "female" in section II(c) of the 1973 Act, which is the provision with which we are faced in this case, are not technical terms and that they must be given their ordinary, everyday meaning in the English language. But no evidence was placed before us to suggest that in contemporary usage in this country, on whichever date one might wish to

> select – 23 May 1973 when the 1973 Act was enacted, 2 May 1981 when Mr and Mrs Bellinger entered into their marriage ceremony or the date of this judgment, these words can be taken to include post-operative transsexual persons. The definition of "male" in the *New Shorter Oxford English Dictionary* (1993) tells us that its primary meaning when used as an adjective is "of, pertaining to, or designating the sex which can beget offspring". No mention is made anywhere in the extended definition of the word of transsexual persons. The word "transsexual" is defined as "having the physical characteristics of one sex but a strong and persistent desire to belong to the other". I see no escape from the conclusion that these definitions, with which the decision in *Corbett v Corbett (orse Ashley)* [1971] P 83 and the views of the majority in the Court of Appeal in this case are consistent, are both complete and accurate. The fact is that the ordinary meaning of the word "male" is incapable, without more, of accommodating the transsexual person within its scope. The Australian cases show that a distinction has to be drawn, even according to the contemporary usage of the word in Australia, between pre-operative and post-operative transsexuals. Distinctions of that kind raise questions of fact and degree which are absent from the ordinary meaning of the word "male" in this country. Any attempt to enlarge its meaning would be bound to lead to difficulty, as there is no single agreed criterion by which it could be determined whether or not a transsexual was sufficiently "male" for the purpose of entering into a valid marriage ceremony."

137. The Supreme Court of Kansas in *Re Gardiner* (decided on 15 March 2002), *supra*, at p 135 and the Court of Appeals of Ohio in *Re Nash* (decided on 31 December 2003), *supra*, para 32 were both of the view that the words "sex", "male", and "female", according to common usage and as understood by the general population in the United States, do not include transsexuals in their assigned sex. In *Re Nash*, the Court referred to *Webster's II New College Dictionary* (1999) to support its view on the ordinary, everyday understanding of the relevant words (as not encompassing transsexuals).

138. The *Shorter Oxford English Dictionary* (6th ed, 2007) defines the word "woman" as an adult female person (p 3657), and defines the adjective "female" as "of, pertaining to, or designating the sex which can beget offspring or produce eggs …" (p 946).

139. Of course, one is concerned with the use of the relevant words, whether in English or in Chinese, in Hong Kong. To this end, there is very little evidence placed before the Court regarding the ordinary, everyday usage of the relevant words in this jurisdiction, or, put another way, whether and how the local usage and understanding differ from the UK or US usage described in the cases.

140. Insofar as it is relevant, the Court's own understanding is that post-operative transsexual people in Hong Kong are still, in ordinary, everyday usage and understanding, referred to as such. In other words, in Hong Kong, a post-operative transsexual individual is still generally referred to as such either in the English language or in the Chinese language (ie "變性人", "變性男人" or "變性女人"), rather than simply as a "man" ("男人") or a "woman" ("女人") in accordance with the post-operative gender acquired. Whilst it is quite true that a sex reassignment surgery is colloquially referred to as a "sex change operation" ("變性手術"), so far as the Court observes, the reference to "sex change" ("變性") in the ordinary usage does not, or does not yet, represent a *general* understanding or acceptance that the person's "sex" (whatever one understands the word to mean) has really been "changed".

141. I am therefore of the view that so far as the plain meaning of the text, or the plain and ordinary meaning of the relevant words, is

concerned, the applicant has not established a case that the relevant words, according to their ordinary, everyday usage in Hong Kong nowadays, encompass post-operative transsexuals in their assigned sex.

4.10 Difficulties posed by a fundamental change in law

142. However, the difficulty that the applicant's case on the first issue faces does not stop there. On the question of whether the existing interpretation should be changed by means of a judicial interpretative process, the problems that taking such a course would give rise to cannot be under-estimated. As explained, that was the main reason why the House of Lords in *Bellinger* declined to go down that path. In particular, Lord Nicholls pointed out that what the House was being asked to do was to effect a major change in the law, having far reaching ramifications (para 37). I have, in the preceding section, already described what the judge had in mind. In the present context, it is worthwhile to recapitulate and elaborate on the points made.

143. First, the uncertainty surrounding the circumstances in which gender reassignment should be recognised for the purposes of marriage. As has been pointed out elsewhere (*Otahuhu* at p 614, para 6.3 of counsel's amended submissions), there is clearly a continuum which begins with the person who suffers from transsexualism but who has not chosen to cross-dress on a regular basis and has embarked on no program of hormonal modification or surgery, through to the person who has embarked on hormone therapy and perhaps has some minor surgical intervention such as removal of gonads, through to the person who undergoes complete reconstructive surgery. The ultimate difficulty here is

where do you draw the line (para 43 of *Bellinger*), and why? Should complete surgical intervention be insisted on as a determinative criterion? Or should some exceptions be made for those who for perfectly legitimate reasons, such as health concerns, cannot undergo a complete sex reassignment surgery? In any event, what is a "complete" sex reassignment surgery? Would what is regarded as a "complete" surgery today be regarded as not-so-complete 5 years down the road, following further advances made in medical science and surgical techniques? If transsexualism is as much to do with the mind as it is to the body, and a male-to-female transsexual person is no less a woman for not having had surgery, or any more a woman for having had it (*SRA* at p 306), why is the undergoing of a surgery of such great importance?

144. All these are questions that the Court, when embarking on a construction exercise in interpreting the everyday words "man" and "woman", cannot answer.

145. Yet practical realities require an adequate degree of certainty as marriage has legal consequences in many directions (*Bellinger*, para 42).

146. If all this is not complicated and confusing enough, the possibility of a post-operative transsexual wishing to undergo a *reverse* sex reassignment surgery cannot be totally discounted. This could possibly happen if the transsexual is not entirely happy with the acquired gender role after a certain period of time, contrary to the pre-operative assessment and expectation. Although a sex reassignment surgery has been described as an "irreversible" process, it is only true to the extent that natural organs, once removed, cannot be replanted into a person's body. It does not

necessarily mean that new artificial organs cannot be implanted or reconstructed in a reverse sex reassignment surgery, just as in the case of an ordinary sex reassignment surgery. This potential problem has also been referred to by Lord Nicholls in para 44.

147. The second main reason Lord Nicholls pointed out is the undeniable fact that recognising gender reassignment for the purposes of marriage is just part of a wider problem which should be considered as a whole and not dealt with in a piecemeal fashion. There should be a clear, coherent policy in respect of all other areas affected, including education, child care, occupational qualifications, criminal law (gender-specific offences), prison regulations, sport, the needs of decency, and birth certificates: *Bellinger*, para 45. Whilst it is no doubt true, as has been said elegantly[1], that one of the greatest strengths of the common law lies in its versatility, its responsiveness to new problems, permitting a freshness of approach and an ability to tackle a novelty without the need to force it into a codified doctrinal mould, there is nonetheless a limit to what it can or should do.

148. Thirdly, there are the implications of same sex marriage to be considered. It cannot be denied that if sex is regarded as biological in nature, as traditionally it has been, particularly for the purposes of the law of marriage, allowing a post-operative transsexual to marry in his or her acquired gender would be tantamount to sanctioning same sex marriage of a particular form. Not only would this be a fundamental departure from the traditional concept of marriage and therefore, at least to some people, be objectionable in the first place, there are also the wider implications, in

[1] http://www.sarasavi.lk/product_info.php?products_id=583

relation to other possible forms of same sex marriage, that is to say, same sex marriage by homosexual and lesbian couples, to be borne in mind.

149. It is almost self-evident that all this must be a matter for the legislature and not for the court in the name of statutory interpretation.

150. Expanding on these themes, it should be noted that different tests or rationales have been put forward to determine when a transsexual individual should be recognised in his or her desired sex. In the US case of *MT v JT*, *supra*, decided in 1976, the Superior Court of New Jersey (Appellate Division) laid emphasis on the "sexual capacity of the individual" (at p 209). Sexual capacity or sexuality in this frame of reference required the "coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female" (*ibid*). In this regard, the Court therefore regarded the ability to have sexual intercourse, albeit by man-made organs, to be sufficient; a proposition which did not find favour with Ormrod J in *Corbett* who was prepared, if necessary, to find that the post-operative transsexual "wife" in that case was incapable of consummating the "marriage" as she did not possess a natural vagina (p 107F-G/H).

151. Putting aside Ormrod J's view for the time being, it would appear that the sexual capacity test favoured by the US Court would not have, however, classified the post-operative transsexual man (Kevin) involved in the Australian case as a man. This is because Kevin had only undergone hormonal treatment, procedures to reduce the breasts to suitable male size and a total hysterectomy with bilateral oophorectomy, "so that his body was no longer able to function as that of a female, particularly for

the purposes of reproduction and sexual intercourse". According to Chisholm J's judgment (paras 29 and 30), Kevin had elected not to have further surgery involving the construction of a penis or testes, for understandable reasons. "Such surgery is complicated and expensive, and has risk of complications and failure", it was noted. Yet the first instance judge and the Full Court of the Family Court of Australia had no difficulty in regarding Kevin as having undergone successfully a complete sex reassignment surgery, and classified him as a male accordingly.

152. By way of further contrast to illustrate the point that indeed different approaches are possible, in the New Zealand case of *Otahuhu*, yet another different test was employed in paragraph 6.6 of counsel's amended submissions which were adopted by Ellis J as part of his judgment (p 615), namely, that of "genital appearance". It was said that whilst a constructed vagina or a constructed penis is required, yet "neither constructed organ needs to be fully sexually functional for the purposes of a valid marriage". There are many forms of sexual expression possible, it was pointed out, without penetrative sexual intercourse.

153. The Court simply has no basis, by way of statutory interpretation, to adopt one (or more?) of these possible approaches and draw the line(s) accordingly. That patently is a matter for the Government and Legislature.

154. Another example to illustrate the difficulties faced and the possible choices available is the question of disclosure. Should a post-operative transsexual, who wishes to marry somebody of the sex opposite to his or her acquired gender, be obliged to inform the intended

spouse of the relevant facts as a prerequisite for allowing them to get married? Or should, for instance, deliberate concealment of those facts, be made a ground for avoiding the marriage? Or should it be regarded as wholly irrelevant? There are certainly different views. See *Otahuhu*, pp 613-614, para 5.1-5.10; but *cf Goodwin*, at para 103.

155. In fact, it is instructive to look at what, in the United Kingdom, Parliament has come up with by way of legislation to resolve the problem, after the House of Lords declined to change the law by way of statutory interpretation. The Gender Recognition Act 2004 contains elaborate provisions regarding the entire question of gender change. It covers all areas of life in which an individual's sex is of legal significance. It is not restricted to marriage. Areas covered include marriage, parenthood, social security benefits and pensions, discrimination, succession, peerage, trusts and property rights, sport, gender-specific offences, as well as foreign gender change and marriage. The Act sets up a panel to determine applications for the issue of a gender recognition certificate. It lays down the criteria for granting an interim or a final certificate. It sets out the procedure involved. It makes consequential amendments to affected statutory provisions. The Act provides an illustration of how the matter may be tackled comprehensively by legislation. By comparing the Act with other similar legislations elsewhere, it is also plain that there are many different legislative ways to deal with the same problem. The Court has been referred to different pieces of legislation. Although they all seek to address the same problem, no two pieces of legislation are exactly the same.

156. Under the UK Act, a full certificate may only be granted, in the case of a transsexual person who is already married in accordance with his or her biological sex, if a divorce is obtained. If after obtaining a divorce and a full certificate, the transsexual person wishes to continue cohabiting with his or her former spouse, they may do so as civil partners pursuant to the Civil Partnership Act 2004, which Parliament, in its wisdom, chose to enact also in 2004, after the Gender Recognition Act. See also *Schalk*, at para 53.

157. This again illustrates the point that if the law is to be changed, it has to be done by the legislature in a comprehensive manner.

4.11 Court cannot fill gaps

158. All this is perhaps just a long way of saying that statutory interpretation is not a tool designed to substitute a judge's views, particularly when considering social issues, to fill gaps: *Bellinger* (CA), para 106, citing Lord Slynn in *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, 33F.

159. It seems to me that at the highest, the applicant's case here is that 40 years after *Corbett*, because of the many changes that have taken place, there has now been opened a legislative gap, so far as our law of marriage is concerned, relating to the position of post-operative transsexuals. It is a gap that needs to be addressed one way or another. Yet it does not follow that it is for a court, in the name of statutory interpretation, to fill the gap. Given the inherent difficulties and potential

ramifications involved, the gap is one that is for the legislature to consider filling. The court has no mandate to do so.

160. Similar sentiments have been expressed, for instance, in *Littleton v Prange*, *supra*, by Hardberger CJ (at p 230):

> "In our system of government it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals. The need for legislative guidelines is particularly important in this case, where the claim being asserted is statutorily based. The statute defines who may bring the cause of action: a surviving spouse, and if the legislature intends to recognize transsexuals as surviving spouses, the statute needs to address the guidelines by which such recognition is governed. When or whether the legislature will choose to address this issue is not within the judiciary's control.
>
> It would be intellectually possible for this court to write a protocol for when transsexuals would be recognized as having successfully changed their sex. Littleton has suggested we do so, perhaps using the surgical removal of the male genitalia as the test. As was pointed out by Littleton's counsel, "amputation is a pretty important step." Indeed it is. But this court has no authority to fashion a new law on transsexuals, or anything else. We cannot make law when no law exists: we can only interpret the written word of our sister branch of government, the legislature. Our responsibility in this case is to determine whether, in the absence of legislatively established guidelines, a jury can be called upon to decide the legality of such marriages. We hold they cannot. In the absence of any guidelines, it would be improper to launch a jury forth on these untested and unknown waters."

4.12 Remedial interpretation

161. Lastly, I have not forgotten that so far as is possible, a statutory provision should be given an interpretation that is fundamental rights-compatible: *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, paras 78 & 79; *Bennion* at p 1322. Without preempting what I am going to say on the second issue, which concerns the constitutionality of the

provisions in question, I would say this at the present juncture: assuming that the present state of the law represents a departure from what is required by the relevant constitutional provisions, still there is a limit to what a court can do by means of interpretation, to prevent the provisions from being found to be unconstitutional. In other words, there is a maximum to what the court can do to salvage an otherwise unconstitutional provision. For all the reasons given, assuming that the relevant provisions, if continued to be interpreted in accordance with *Corbett*, are incompatible with, say, the constitutional right to marry, that is something the Court cannot avert by way of remedial interpretation.

4.13 Conclusion on the 1st issue

162. In conclusion, I hold that on the proper interpretation of the relevant provisions in the Marriage Ordinance (and section 20(1)(d) of the Matrimonial Cause Ordinance), "man" and "woman", and "male" and "female", do not cover a post-operative transsexual man and woman respectively. Rather, their sex is and continues to be determined according to their biological sex at birth, for the purposes of those provisions.

5 2ND ISSUE: CONSTITUTIONAL RIGHT TO MARRY

5.1 The issue

163. I now turn to the second issue raised by the applicant by way of an alternative argument. Essentially, the applicant argues that the relevant provisions in the Marriage Ordinance, insofar as they do not permit any post-operative transsexual women to marry as a woman under any circumstances, are unconstitutional. The applicant relies on article 37

of the Basic Law and article 19(2) of the Hong Kong Bill of Rights, which is constitutionally entrenched by article 39(1) of the Basic Law. They both deal directly with the right to marry. The applicant also relies on the right to privacy guaranteed by article 14 of the Hong Kong Bill of Rights.

164. Unlike what is involved in the first issue, under this alternative argument raised by the applicant, the applicant does not require the Court to work out the circumstances under which post-operative transsexuals may marry in their assigned gender. All she seeks is a declaration that the relevant statutory provisions, insofar as they prevent any post-operative transsexual women from marrying as a woman under any circumstances, are unconstitutional. The declaration would leave it to the Government and Legislature to decide the circumstances under which such a post-operative transsexual woman may marry lawfully. It also leaves it to the Government and Legislature to work out the implications of such a change in law.

5.2 Right to privacy does not add anything

165. Although arguments had been advanced in the Form 86 and the written submissions of the applicant based on the right to privacy, at the substantive hearing, Mr Philip Dykes SC (Mr Hectar Pun and Mr Earl Deng with him), for the applicant, focused his argument on the right to marry. I believe that is the correct approach. As Ms Monica Carss-Frisk QC (Ms Lisa Wong SC and Mr Stewart Wong with her), for the respondent, submitted, the answer to this second issue must necessarily be dependent on the right to marry. If, upon proper interpretation, the applicant could not marry as a woman under the constitutional right to

marry, it would be a very strange result if the much more general right to privacy were to be interpreted to give her such a right. This analysis has the support of the European Court of Human Rights in *Schalk*, which involved a challenge against the ban on same sex marriage. The Court pointed out that the case turned on article 12 of the European Convention which deals specifically with the right to marry. The Court rejected the contention that, if not included in article 12, the right to marry might be derived from article 14 (prohibition of discrimination) taken in conjunction with article 8 (right to respect for private and family life). The Court reiterated that the Convention is to be read as a whole and its articles should therefore be construed in harmony with one another. Having decided that article 12 does not impose an obligation on Contracting States to grant same sex couples access to marriage, the Court concluded that article 14 taken in conjunction with article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either: para 101.

166. In this regard, one should remember that in the earlier case of *Goodwin*, which concerned transsexuals' right to marry rather than same sex couples' access to marriage, the Court did hold a violation of article 8 as well as article 12 of the European Convention. However, it should be noted that *Goodwin* was not concerned only with the right to marry; but it also involved other issues regarding recognition generally of a post-operative transsexual's acquired gender, and article 8 was therefore clearly relevant.

167. In the present case, in my view, it is essential to focus on the right to marry, guaranteed under article 37 of the Basic Law and

article 19(2) of the Hong Kong Bill of Rights. The applicant's argument will stand or fall with the Court's determination on the right to marry. Nothing will be gained by a separate consideration of the right to privacy under article 14 of the Hong Kong Bill of Rights.

5.3 The constitutional provisions

168. Article 37 of the Basic Law reads:

> "The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law."

169. Article 19 of the Hong Kong Bill of Rights which is based on article 23 of the ICCPR reads:

> " **Rights in respect of marriage and family**
>
> (1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
>
> (2) The right of men and women of marriageable age to marry and to found a family shall be recognized.
>
> (3) No marriage shall be entered into without the free and full consent of the intending spouses.
>
> (4) Spouses shall have equal rights and responsibilities as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

5.4 Some preliminary observations

170. Certain preliminary observations should be made.

171. First, in relation to article 37 of the Basic Law, it is plain that the right to freedom of marriage and the right to raise a family freely ("自

願生育的權利")[2] are separate, though inter-related, rights. This is plain from the wording itself, which refers to two respective rights, whereas, for instance, under the European Convention, article 12 appears to lump the right to marry and the right to found a family together ("… the right to marry and to found a family …"). However, even under the European Convention, *Goodwin* has held (in para 98) that whilst article 12 covers two aspects (to marry and to found a family), the second aspect is not a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first aspect of article 12. In my view, *a fortiori*, the two rights under article 37 should be read accordingly.

172. Secondly, whilst article 37, unlike article 19(2) of the Hong Kong Bill of Rights (or article 12 of the European Convention), simply refers to "Hong Kong residents", rather than to "men and women", Mr Dykes for the applicant has expressly disavowed any intention to argue in these proceedings that article 37 therefore allows same sex marriage. In this regard, the case of article 37 is different from that in relation to article 9 of the Charter of Fundamental Rights of the European Union, signed on 7 December 2000, which does not refer to "men and women" when guaranteeing the right to marry and the right to found a family. *Goodwin* pointed out that the removing of the reference to men and women in article 9 of the Charter was done "no doubt deliberately" (para 100), and apparently signified a relaxation towards same sex marriage. Given the very different enactment history and background of our Basic Law, I do

[2] For the interpretation of the right to raise a family freely, see this Court's judgment in *Gurung Deu Kumari v Director of Immigration*, HCAL 79/2009, 14 September 2010, paras 51 to 60.

not think, as presently advised, the same argument can be advanced in relation to article 37 of the Basic Law.

173. In my view, for the purposes of the present case, one should proceed on the basis that article 37 is only concerned with opposite sex marriage.

174. No similar problem arises in relation to the wording of article 19 of the Hong Kong Bill of Rights which specifically refers to "men and women". The European Court has consistently held that the reference to "men and women" in article 12 of the European Convention, which is the same as article 19(2) of the Hong Kong Bill of Rights (and article 23(2) of the ICCPR) in this aspect, means that same sex marriage is excluded: *Rees*, para 49; *Schalk*, para 55.

175. More importantly, the United Nations Human Rights Committee has, in its decision in *Juliet Joslin v New Zealand*, Communication No 902/1999, 17 July 2002, pointed out, in relation to complaints made by two lesbian couples, that use of the term "men and women" in article 23(2) of the ICCPR, rather than of a general term (such as "every human being", "everyone" and "every person" used elsewhere in Part III of the Convention), has been consistently and uniformly understood as indicating that the treaty obligations of States Parties stemming from article 23(2) is to recognise as marriage only the union between "a man and a woman" wishing to marry each other (paras 8.2 and 8.3). It does not cover a same sex couple.

176. In short, the provisions under discussion are all concerned with opposite sex marriage. What is, therefore, directly in issue, is not whether, constitutionally speaking, the law should allow the applicant to marry a man by way of a same sex marriage. That is not the contention of the applicant. The applicant does not contest the prohibition against same sex marriage. She fully accepts that marriage is heterosexual. What she argues is that her sex, for the purposes of marriage, should be determined by reference to her post-operative acquired gender, rather than to her biological sex at birth. The battle lines have been drawn on that basis.

5.5 Principles of constitutional interpretation

177. The principles of interpretation of the Basic Law, and in particular, of provisions guaranteeing fundamental rights in Hong Kong, are well-established. In interpreting the Basic Law, a purposive approach is to be adopted. The courts must consider the purpose of the instrument and its relevant provisions, as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument. In resolving gaps and ambiguities, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. A court must avoid a literal, technical, narrow or rigid approach. It must consider the context, which is to be found in the Basic Law itself as well as the relevant extrinsic materials including the Joint Declaration. Furthermore, because the context and purpose of the Basic Law were established at the time of its enactment in 1990, the extrinsic materials relevant to its interpretation are, generally speaking, pre-enactment materials, that is, materials brought into existence prior to or contemporaneous with the

enactment of the Basic Law. Assistance may also be gained from any traditions and usages that may have given meaning to the language used.

178. More specifically, fundamental rights and freedoms must be given a generous interpretation so as to give individuals the full measure of those rights and freedoms, whereas restrictions on fundamental rights (insofar as they are not absolute rights) must be narrowly interpreted. The burden is on the Government to justify any restriction. See *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 28-29; *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 223-225; *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, paras 24-30.

5.6 Right to marry as a "strong" or "fundamental" right

179. The right to marry, although not an absolute right, is nonetheless a "strong right". It is not 'absolute" in the sense that no one is free to marry any other person irrespective of age, gender, consanguinity, affinity or any existing marriage. It is nonetheless a "strong" or "fundamental" right in that national laws governing the exercise of the right to marry must never injure or impair the substance of the right and must not deprive a person or category of person of full legal capacity of the right to marry or substantially interfere with their exercise of the right. *R (Baiai) v Secretary of State for the Home Department (Nos 1 and 2)* [2009] 1 AC 287, paras 13 and 14. The Strasbourg case law has established that national laws may lay down rules of procedure and rules of substance based on generally recognised considerations of public interest, of which rules concerning capacity, consent, prohibited degrees of consanguinity

and the prevention of bigamy are examples. But the right to marry may not be subjected to conditions which impair the essence of the right. Thus it is an over-simplification of the legal position to say that restrictions may legitimately be placed on the exercise of the right to marry, so long as the proportionality test can be satisfied to "justify" the restrictions. *Baiai*, at paras 14-22 and 46.

5.7 A question of definition rather than of restriction

180. In the present case, although some arguments based on the proportionality test and justification had been put forward in the written submissions, at the substantive hearing, Mr Dykes for the applicant focused his arguments on whether a post-operative transsexual woman like the applicant should be considered as a woman for the purposes of marriage. Ms Carss-Frisk's approach was the same.

181. In my view, leading counsel's approach is correct. The present case is not so much concerned with restrictions purported to be placed by the relevant statutory provisions on the right to marry as with a definitional question. In other words, one is concerned with defining and delimiting the right to marry guaranteed under the relevant provisions. Thus when article 37 provides that Hong Kong residents' "freedom of marriage" shall be protected by law, what does the Basic Law mean by "marriage"? The definition of "marriage" is in issue. More specifically, when marriage is understood, as it is traditionally understood, as a voluntary union between persons of the opposite sex, that is to say, a voluntary union between a man and a woman, the definitional question becomes: what is a "man" or "woman" under the Basic Law?

182. Thus analysed, one is not concerned with, for instance, whether there is any legitimate aim to be served to "restrict" the right of post-operative transsexuals to marry in their acquired gender, or whether any such "restriction" is rationally connected with any such legitimate aim, or is no more than is necessary to achieve the same, even if one were to treat the proportionality test as applicable.

183. The prior question is and remains: what is a "man" or "woman" in the definition of "marriage" when referred to in the Basic Law (or in article 19(2) of the Hong Kong Bill of Rights)?

5.8 Historical context and understanding

184. The meaning of the words "man" and "woman" and therefore the meaning of the word "marriage" as used by the drafters of the Basic Law when it was promulgated in 1990 cannot be seriously in doubt. Back at that time, *Goodwin* was still a decade away and the traditional understanding of marriage had just been reconfirmed by the European Court in *Rees*, *supra*, three and a half years before. So far as domestic law was concerned, at that time *Corbett* undoubtedly represented both English law and Hong Kong law. In terms of society's values and understanding of the institution of marriage at the time, there cannot be any possible doubt that post-operative transsexuals were not accepted in their assigned gender as such for any purposes, including marriage. *A fortiori*, if one takes one step back and considers the Joint Declaration signed in December 1984, which provides specifically in Annex I, JD Ref 150-151 for "the freedom to marry and the right to raise a family freely", which

article 37 of the Basic Law gives effect to, the position becomes even clearer.

185. As for the ICCPR, it was adopted in 1966 and entered into force in 1976. Again there can be no doubt that back in those days, there was no international consensus informing the relevant provisions in the ICCPR to the effect that in determining a man or a woman for the purposes of the right to marry guaranteed under the Convention, a post-operative transsexual person should be classified in his or her assigned gender.

186. For the sake of completeness, it should be added, as regards the European Convention signed in 1950, that in *Schalk*, *supra*, the European Court likewise pointed out that in the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex (para 55). As mentioned, when *Rees* was decided in 1986, the European Court was still in a position to pronounce unambiguously that the right to marry guaranteed under article 12 of the European Convention referred to "the traditional marriage between persons of opposite biological sex" (para 49).

187. In other words, if the definitional question is to be answered by reference only to the historical context or meaning of the Basic Law or the ICCPR, the case of the applicant must fail. The applicant's case is therefore necessarily premised on giving the relevant words a "generous", wider definition or meaning so as to encompass her case. Hence the argument is that both the Basic Law and the ICCPR are "living instruments" and the rights guaranteed thereunder are capable of evolution and change to meet changing social mores and circumstances.

5.9 Close relationship between the right to marry and societal consensus

188. As a general statement, I have no difficulty with this approach. Marriage is a social as well as a legal institution. Marriage as a social institution in any given society is necessarily informed by the societal consensus and understanding regarding marriage and the essence thereof in that society. Naturally one expects harmony between the law of marriage and the societal consensus on marriage. The law of marriage is expected to reflect the societal consensus. Indeed as has been pointed out in *Baiai*, *supra*, in the context of the fundamental right to marry, a society's marriage law may, *and may only*, lay down rules of procedure and rules of substance based on "generally recognised considerations of public interest" (para 14). This last term is just another description for society's general consensus and understanding regarding marriage and the essence thereof. Thus, for instance, in a society like the UK or Hong Kong, where monogamy is generally regarded as of essence to marriage by society, the law defines marriage as a union between one man and one woman and lays down prohibitions and sanctions against bigamy. Likewise, where a society does not or no longer accepts arranged marriages, marriage is defined as a *voluntary* union between two persons of the opposite sex.

189. This close relationship between the law and society's general consensus and understanding regarding marriage and the essence thereof is important to a proper understanding of the fundamental right to marry. By the nature of things, marriage is at the same time both a legal institution and a social one. Giving the right to marry a generous interpretation, any disharmony between the law of marriage and the general societal consensus regarding marriage and the essence thereof should, generally

speaking, be resolved in favour of that which gives the individual more freedom. Whilst this approach does not mean that considerations other than societal consensus are insignificant, it does highlight the importance of societal consensus in defining and delimiting the right to marry at any given time.

190. In other words, generally speaking, in the absence of any compelling reason to the contrary, the constitutional right to marry requires the law of marriage not to lag behind the general societal consensus for the time being. The former cannot be more restrictive than the latter, for otherwise, generally speaking, the "essence" of the right would be impaired and the law would be unconstitutional. (The converse is, however, not true – in a democracy, the legislature is at liberty to enact, by a simple majority or otherwise in accordance with the relevant legislative requirements, a law of marriage that is more liberal than the general societal consensus and understanding.)

191. Societal consensus is not static in any given society. It evolves with time. It is therefore right to understand the right to marry by reference to (amongst other things) the contemporary societal consensus. In this regard, one is concerned with what the current societal consensus is, rather than what it once was, or, what it might become in future. Nor, still less, is one concerned with what the societal consensus and thus what the right to marry ought to be according to one view or another.

192. The last point is important because the versatility of the constitutional right to marry does *not* give the courts a judicial licence to engineer a fundamental social and legal reform of the institution of

marriage. In other words, what is constitutionally guaranteed is the right to participate in the institution of marriage as informed by the contemporary societal consensus, everything else being equal. Absent any compelling reasons, the constitutional guarantee does not mean that a Hong Kong resident can ask a court to construe the right to marry in such a way that does not enjoy contemporary societal consensual support, and, in substance, to effect a fundamental social and legal reform of the current institution of marriage to accord with the resident's idea of what it ought to be. Nor does the guarantee give the court a judicial licence to bring about a fundamental social and legal reform by interpreting (or re-interpreting) the right to accord with the court's own notion of what the institution of marriage ought to be. That, it must be emphasized, lies outwith the court's constitutional remit and institutional capability. It is a function that properly belongs to the Government and the Legislature, which, as mentioned, is at liberty to relax or otherwise liberalise the existing marriage law in accordance with its view of the public good.

193. By the same token, the constitutional right to marry does not entitle a resident to ask the court to anticipate what the societal consensus might become in future and to allow him or her to participate in a form of marriage that is yet to be encompassed by the present societal consensus. What lies in the future is everyone's guess, and the court is not concerned with how the constitutional right to marry might be interpreted in future, but only with its proper interpretation now, by reference to, amongst other things, what the contemporary societal consensus is, in order to determine the case at hand. This is of significance when one comes to consider the "modern trend".

194. Thus analysed, the crucial question is: what is the contemporary societal consensus regarding marriage and the essence thereof? Since marriage as a social and legal institution "has deep-rooted social and cultural connotations which may differ largely from one society to another" (*Schalk* at para 62), one must primarily focus on the position in Hong Kong when deciding what the contemporary societal consensus is.

195. In finding out what the contemporary societal consensus regarding marriage or its essence is, it is instructive to look at what relevant changes have occurred in recent years and to what extent the traditional understanding in Hong Kong of the institution of marriage or its essence has been affected by those changes. Generally speaking, where the relevant societal consensus is in a stage of transition or cannot otherwise be easily ascertained, the court should, in the absence of compelling reasons to the contrary, defer to the judgment of the legislature as reflected in the existing law of marriage, and be most slow to tamper with the status quo by giving the constitutional right to marry an expanded meaning not originally encompassed by the text. After all, at least institutionally speaking, the legislature is in a much better position than the court to determine the relevant contemporary societal consensus. In case where there is no clearly discernable societal consensus, the stance of the elected legislature, as is reflected in the existing law of marriage, should be taken as representative of society's view for the time being, pending the emergence of a clearer societal consensus. All this, as will presently be demonstrated, is consistent with the approach of the European Court.

196. The above discussion primarily focuses on the right to marry derived from the freedom of marriage guaranteed under article 37 of the

Basic Law, which is unique to Hong Kong, as opposed to the ICCPR. However, a similar analysis applies to the right to marry guaranteed under the Hong Kong Bill of Rights (which is based on the ICCPR), save that the emphasis is more on the broad, general international consensus amongst the Contracting States rather than on the societal consensus of any individual society.

197. It is with all this firmly in mind that I will proceed to consider the many points raised in arguments or in the cases and authorities cited to the Court that would appear to be in favour of construing the constitutional right to marry as encompassing a post-operative transsexual in his or her preferred sex.

5.10 Modern day medical approach

198. First, the argument has been raised repeatedly that medical science now adopts a holistic approach towards determining a person's sex or gender at any particular time. The sex assigned to a person at birth, determined according to the biological indications available then, is at best correct as at the time of birth. As the individual grows up, and as more is known about his psychological sex and other relevant social indications associated with the individual, the medical determination of the person's sex or gender must be reviewed and, if necessary, revised accordingly.

199. In medical science, at least, a person's sex or gender is not immutable. In particular, after a successful sex reassignment surgery, a transsexual, like the applicant in the present case, is medically certified to be of his or her newly acquired gender.

200. The argument, in short, is that the law's definition of a person's sex should follow that of the doctors.

201. I can see the force of the argument. However, the law's definition of a person's sex serves a purpose that is not necessarily identical to that served by a medical definition. I need not repeat here what I have already said regarding the purpose and context of the Marriage Ordinance or the close relationship between marriage law and societal consensus. Marriage as a social institution has existed for thousands of years. Whilst different marriage laws have come and gone, the institution, as evolved, remains. Leaving aside those occasions when the law seeks to modify or change the social institution of marriage, the law's function is really to recognise, regulate and impose restrictions that represent generally recognised considerations of public interest on the institution of marriage as practised in society. Marriage law is not enacted for the purposes of reflecting the definitions adopted by medical science for the time being as such.

202. In other words, whilst I bear in mind the changes made in the medical understanding of sex and gender, I do not find this a particularly decisive factor in the present context.

5.11 Social changes

203. Then there are the social changes to consider. It has been said, and I have described the argument, that nowadays, procreation is no longer an important aspect of the institution of marriage. Rather, the emphasis is on the mutual society, help and comfort that one ought to have of the other.

See *Bellinger* (HL) at para 46. Thorpe LJ in *Bellinger* (CA) also described other changes to marriage as an institution that had taken place, such as attitudes toward divorce, cohabitation and illegitimacy (para 128). That being the case, it does not really matter, the argument runs, whether the mutual society, help and comfort comes from a biological woman, in a case where the opposite partner is a man, or from a post-operative transsexual woman.

204. Whilst I will return to this topic later on, I would make the following observations at this juncture. For my part, I do not view the fact that nowadays some people choose to cohabitate with each other and have children *relevantly* affects the institution of marriage as traditionally understood. No doubt, society has become much more permissive and accepting than before. Admittedly, marriage has become less important, in the sense that it is no longer the only socially recognised umbrella under which people may live together and have children. But there are still many who choose to invoke the institution of marriage to found a family and raise children. In fact, at least in Hong Kong, that would still appear to be the case. That is to say, more children would still appear to have been born out of relationships of marriage than out of other relationships. In any event, on the question of whether marriage, for those who still choose to marry, should continue to be between two persons of the opposite biological sex, the relevance of the prevalence of cohabitation would appear to be extremely tenuous. Likewise, a high divorce rate in society certainly suggests that the "for life" aspect of marriage no longer reflects the contemporary societal understanding regarding the essence of marriage. Yet it is difficult to see any real bearing this may have with the question of a transsexual's right to marry.

205. However, I have not lost sight of the real point made in support of a transsexual's case here, ie that even within the institution of marriage, procreation has lost much of its previous significance as the, or a, major purpose for the institution. Some people marry with no ability to procreate (because of health, age or other reasons). More importantly, many people marry with no intention to having children. Stripped of procreation as its, or its main, purpose, the argument runs, marriage becomes more a legally recognised relationship to afford mutual society, help and comfort that the one ought to have of the other. Moreover, a family can be founded without having natural children. Children may be adopted. Children from former marriages and relationships would become members of the same family after a new marriage. And children may be conceived by artificial insemination – this is possible with a couple involving a post-operative transsexual man.

206. The Court recognises all these changes. However, as Lord Hope pointed out in *Bellinger* (at para 64), the ability to reproduce one's own kind still lies at the heart of all creation, and the single characteristic which invariably distinguishes the adult male from the adult female throughout the animal kingdom is the part which each sex plays in the act of reproduction. There can be no doubt that originally, marriage had a lot to do with procreation and the continuation of the family line. That is, or was, particularly true with a predominantly Chinese society like Hong Kong. Furthermore, in Hong Kong, unlike the position in Australia and New Zealand, non-consummation is still a ground to avoid a marriage: section 20(2)(a) and (d), Matrimonial Causes Ordinance. This provision is not challenged. On the other hand, it is plain that there is a trend moving away from that traditional model. The all important question is, therefore,

whether we have, in Hong Kong, reached a point where the type of transsexual marriage under discussion is no longer regarded as repugnant to our society's understanding of the institution of marriage and its essence. I will return to this question in due course, but one must recognise the potential breadth of the applicant's argument, which essentially downplays the significance of procreation and emphasizes on the aspect about affording mutual society, help and comfort. The same logic, and the same argument, would appear to justify also a *pre-operative* transsexual person marrying in his or her preferred sex, as well as other forms of same sex marriage and even polygamous marriages (whether same sex or heterosexual). This shows that the problem one is dealing with cannot be answered by reference to logic or deduction alone, which is essentially what the present argument is all about; rather, it must be answered primarily by reference to societal understanding and acceptance.

5.12 Relevance of European jurisprudence

207. This brings me to the European and international jurisprudence.

208. In my view, *Goodwin* is only of limited assistance in the present context because *Goodwin* was based essentially on the European Court's perception of what the national practices and general consensus of the Contracting States in the Council of Europe had become by 2002. It should be remembered that in the earlier cases decided in the 1980s and 1990s, the European Court had decided against transsexuals on account of the traditional concept of sex and marriage, the absence of a generally shared approach amongst the Contracting States, and the margin of

appreciation that should be accorded to the Contracting States. In *Goodwin*, the European Court emphasized the "major social changes" in the institution of marriage since the adoption of the European Convention (para 100) and the emerging European consensus on the questions posed by transsexuals, when concluding that the right to marry guaranteed under the European Convention had evolved to such a stage that to deny a post-operative transsexual the right to marry in his or her acquired gender under any circumstances is an infringement of the guaranteed right to marry under the European Convention. The European Court described the transition and emerging consensus in the following terms:

> "84 Already at the time of the *Sheffield and Horsham* case [ie 1998], there was an emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment. The latest survey submitted by Liberty in the present case shows a continuing international trend towards legal recognition. In Australia and New Zealand, it appears that the courts are moving away from the biological birth view of sex and taking the view that sex, in the context of a transsexual wishing to marry, should depend on a multitude of factors to be assessed at the time of the marriage.
>
> 85 The Court observes that in *Rees* in 1986 it had noted that little common ground existed between States, some of which did permit change of gender and some of which did not and that generally speaking the law seemed to be in a state of transition. In the later case of *Sheffield and Horsham*, the Court's judgment laid emphasis on the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. While this would appear to remain the case, the lack of such a common approach among 43 Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and

> practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."

209. In the subsequent case of *Schalk* concerning the question of same sex marriage, the European Court explained and distinguished *Goodwin* by emphasizing that in *Goodwin*, "the Court perceived a convergence of standards regarding marriage of transsexuals in their assigned gender" (para 59). However, the Court pointed out, there was "no European consensus regarding same-sex marriage", as there were no more than 6 out of 47 Convention States that allowed same sex marriage (para 58).

210. All this demonstrates, in the context of a regional international treaty, the importance of a broad consensus amongst the contracting states in deciding whether there should be a change in the legal definition of the right to marry. In *Goodwin*, as *Schalk* has explained, the European Court concluded that such a change was warranted by a convergence of standards amongst the Contracting States on the evidence before the Court. But Hong Kong is not a party to the European Convention, nor is Hong Kong a European city or community. Whilst, generally speaking, decisions of the European Court on identical or similar rights are regarded as highly persuasive in this jurisdiction, nonetheless, given the nature of the right concerned, Hong Kong must decide the current content of the right to marry in accordance with our own situation.

5.13 Emerging consensus under the ICCPR?

211. This brings me conveniently to the ICCPR, which, unlike the European Convention, is applicable in Hong Kong by reason of article 39(1) of the Basic Law and the Hong Kong Bill of Rights. Is there any consensus or emerging consensus, or "a convergence of standards", amongst the Contracting States to the ICCPR? Despite the "modern trend" which I have described at the beginning of this judgment, there is no evidence of any relevant consensus or majority understanding or practice amongst the 160 odd Contracting States to the ICCPR. Despite their industry, those acting for the applicant have only managed to point out to the Court a brief observation made by the United Nations Human Rights Committee in its concluding observations on the third periodic report of Ireland in the Committee's 93rd session (7 to 25 July 2008). In paragraph 8, the Committee expressed concern that Ireland had not recognised a change of gender by transgender persons by permitting birth certificates to be issued for these persons (in the context of articles 2, 16, 17, 23 and 26 of the ICCPR). The observation, unfortunately, was not accompanied by any reasoning or reference to legal materials. In any event, no other UN or other relevant materials have been placed before the Court to shed light on the latest thinking on the right to marry guaranteed under the ICCPR, whether by reference to emerging State consensus or otherwise.

212. In particular, the Human Rights Committee has, apparently, never made any similar observations regarding the position in Hong Kong, despite the periodic submission of human rights reports. The last one, by the Central Government on Hong Kong's behalf, was submitted in 2005, and the related hearing was held on 20 and 21 March 2006. The Committee's concluding observations, adopted on 30 March 2006, were

published as CCRP/C/HKG/CO/2 on 21 April 2006. Likewise, the United Nations Human Rights Council conducts a Universal Periodic Review on the human rights situation of all UN Member States. Hong Kong's last report was submitted as part of the Mainland's report in March 2008. The related hearing took place on 9 February 2009 and the relevant report of the Working Group on the Universal Periodic Review was adopted by the Human Rights Council in June 2009. No relevant comment on the question of transsexual marriage in Hong Kong was made.

5.14 Position under the Basic Law

213. The right to marry guaranteed under article 37 of the Basic Law is not complicated by any treaty obligation or interpretation. It is a right guaranteed under our own constitution. However, it does not mean that one can change the meaning or definition of the crucial words at will. The Basic Law was drafted in the 1980s, promulgated in 1990 and came into effect in 1997. The scope of application of article 37, as understood in 1997 (or earlier), cannot possibly be in doubt. The question is whether 13 years down the road, an expanded meaning should be given to the right guaranteed by the same article by reason of changes that have taken place since to the understanding of the institution of marriage and the essence thereof.

214. In this regard, in my view, the presence or absence of a societal consensus is of crucial significance. If the societal understanding in Hong Kong of the institution of marriage or its essence has changed during the intervening years so that nowadays, broadly speaking, people are receptive to post-operative transsexuals marrying in their acquired sex,

that must be a strong reason for expanding the legal definitions of "man", "woman" and "marriage" to include a post-operative transsexual person in his or her acquired sex accordingly. As I have said, generally speaking, the content of the constitutional right to marry is informed by the contemporary societal consensus regarding marriage and its essence.

5.15 Contemporary societal consensus

215. As mentioned, the European Court pointed out in the latest case of *Schalk* that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society (para 62). Those observations were made in the context of a same sex marriage case. Distinguishing *Goodwin*, the European Court said that in *Goodwin*, the Court noted that "there was widespread acceptance of the marriage of transsexuals in their assigned gender" (para 52) and perceived a "convergence of standards" regarding marriage of transsexuals in their assigned gender (para 59). No such convergence of standards regarding granting a same sex couple access to marriage was perceived by the Court, and the Court therefore did not find that article 12 of the Convention imposed an obligation on the Government of Austria to grant a same sex couple access to marriage (paras 58 and 63).

216. In my view, although *Schalk* was concerned with same sex marriage, the same approach must be adopted here. Absent a convergence of standards amongst the Contracting States to the ICCPR, or, by the same token, absent a societal consensus or understanding in Hong Kong (in

relation to the Basic Law right), regarding marriage of transsexuals in their assigned gender, the Court must not rush to substitute its own judgment in place of that of the national authorities of the Contracting Parties to the ICCPR, or that of the Government or Legislature in Hong Kong.

217. I have not forgotten that fundamental rights are an exception to the democratic principle of majority rule. Some rights are considered to be so fundamental that even the majority of a society cannot, or cannot without justification, take them away from the minority. However, one is not here concerned with determining whether a fundamental right may be restricted according to the wishes of the majority. Rather, one is here to discover the present day boundary of the social institution of marriage as is understood by society or a majority thereof, and to give the fundamental right to marry a contemporary context or meaning that conforms to the social institution as it is understood now.

218. In this regard, the Court bears in mind the wise words of Thorpe LJ in *Bellinger* (CA) at para 157 that social developments are scarcely capable of proof and judges must be sensitive to these developments and must reflect them in their opinions, particularly in family matters, if the law is to meet the needs of society.

219. Yet what is singularly missing in the evidence and the voluminous materials placed before the Court in the present case is evidence or material establishing directly or inferentially that in present day Hong Kong, the emerging consensus, or still less, the general societal understanding, is such that post-operative transsexuals marrying in their acquired sex is regarded as acceptable in Hong Kong, or more generally,

that the natural/biological heterosexual aspect of marriage is no longer regarded as absolutely essential. If anything, the available materials, some of which are slightly dated, paint a rather different picture: see Emil Ng & Joyce Ma, *Hong Kong (Special Administrative Region in the People's Republic of China)* in Francoeur (ed), *The International Encyclopedia of Sexuality*, Vol IV, 216, 230 (2001); Robyn Emerton, *Finding a voice, fighting for rights: the emergence of the transgender movement in Hong Kong* (2006) 7 IACS 243, 250-254; Sam Winter, *'Country Report': Hong Kong: social and cultural issues*, Transgender Asia Research Centre (2002, revised: 2009)[3].

220. Neither is there much evidence or any detailed study to show how post-operative transsexuals in Hong Kong live their lives, in terms of their romantic, sexual and cohabitational relationships with those of the opposite sex and of their intention to get married; in terms of the attitude of those involved in those relationships with transsexuals[4]; and in terms of the attitude of family members, relatives, colleagues and friends (particularly those who are aware of the background facts) toward those relationships and toward the intention to get married.

221. Nor is much detail disclosed about the case of the applicant herself, such as, whether her male partner is aware of her transsexual

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[3] http://web.hku.hk/~sjwinter/TransgenderASIA/country_report_hk_social.htm.

[4] The tragic case of Sasha Moon, a transsexual who committed suicide in front of her boyfriend on 24 September 2004, was apparently linked to the non-acceptance of her "true identity" by the boyfriend after it was revealed to him: Robyn Emerton, *Finding a voice, fighting for rights: the emergence of the transgender movement in Hong Kong* (2006) 7 IACS 243, 251. Together with the suicide of another transsexual, Louise Chan, three days before, the two tragedies aroused some media discussion and public awareness of the plight of transsexuals at the time, but apparently the subject remained controversial and quite definitely no relevant societal consensus arose out of the incidents: *ibid* at pp 374-377.

background[5], and how he and others (particularly those who are aware of the relevant background) regard and accept their relationship and intended marriage. The evidence available, and there is some, tends to be rather general and sketchy. In *Kevin*, it should be recalled, very substantial evidence was placed before the Australian Court to demonstrate the overwhelming acceptance by all those who knew the couple, including in particular, the mother-in-law of Kevin, of the couple's relationship: evidence of 39 witnesses, 23 who were family and friends of Kevin and 16 others who were work colleagues or acquaintances, was adduced (paras 47 to 66). Whilst the proper interpretation of the right in question cannot turn on the facts of one individual case, such evidence would nonetheless be helpful in gauging the general societal understanding and consensus (if any).

222. Absent such evidence or evidence to similar effect, the Court, no matter how sensitive it is to social developments, which are by nature scarcely capable of direct proof, just cannot assume what the latest position in Hong Kong is and proceed to "bring up to date" the traditional understanding and meaning of marriage on that assumed footing.

223. Put at the lowest, the present societal consensus or understanding is far from clear. As explained, where the relevant societal consensus is in a stage of transition or cannot otherwise be easily ascertained, generally the court should, in the absence of compelling reasons to the contrary, defer to the judgment of the legislature as reflected

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[5] In the social assessment and psychological reports prepared in 2006 and 2007 respectively, there were brief mentions of the applicant's boyfriend, who was aware of the applicant's background and who had expressed the intention to marry the applicant after her completion of the SRS. However, it is unclear whether the boyfriend is the same person as the male partner whom the applicant wishes to marry now.

in the existing law of marriage, and be very slow to tamper with the status quo by giving the constitutional right to marry an expanded meaning not originally encompassed by the text. After all, at least institutionally speaking, the legislature is in a much better position than the court to determine the relevant contemporary societal consensus. In case where there is no clearly discernable societal consensus, the stance of the elected legislature, as is reflected in the existing law of marriage, should be taken as representative of society's view for the time being, pending the emergence of a clearer societal consensus.

224. The Court has not forgotten that on the Mainland and in Taiwan, as well as in Singapore, which has a majority ethnic Chinese population, post-operative transsexuals are apparently allowed to marry in their acquired gender. But the Court has no idea or evidence as to why the laws there were changed, or whether the present laws represent the societal consensuses in those societies. In any event, I do not think it right to use a societal consensus, if any, reached elsewhere to determine, or to serve as evidence of, what the societal consensus in Hong Kong, if any, is. Likewise, I do not think the "modern trend" is relevant in the present context. The Court is not interested in what might be the case in future. It is only concerned with what the present societal consensus or understanding about the institution of marriage or the essence thereof is.

225. I accept the argument that the Government's actions, including allowing a post-operative transsexual to change the entry on his or her identity card, is evidence of some recognition of the transsexual's acquired gender. However, as Ms Carss-Frisk has submitted, identity

cards are primarily for identification purposes and purposes of daily living[6], and one is concerned with something else here. Moreover, in terms of societal consensus and understanding, I do not find the changing of identity card to be sufficient evidence of a general change in societal understanding in general, or of a change in the understanding of the institution of marriage or its essence in particular.

226. Likewise, the fact that treatment of transsexuals, including the carrying out of SRS procedures, is publicly funded, is quite insufficient to establish a general change in understanding or an emerging societal consensus. Many, one suspects, would just regard the treatment simply as what it is, that is to say, medical treatment for an unfortunate condition.

227. Nor is the more accepting/less-discriminatory attitude displayed by an increasing number of people in our society by itself sufficient evidence of a shift in societal attitude regarding the essence of marriage. Here, one must not get confused between society's attitude in general towards transsexualism and transsexuals which has apparently become more sympathetic and understanding, and society's consensus or understanding of the institution of marriage and its essence.

5.16 Infringement of the very essence of the right to marry?

228. Then, there is the argument that allowing a post-operative transsexual to marry in his or her acquired sex is the only meaningful way

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[6] Even this could give rise to controversies in real life situations, such as the use of toilets or changing rooms by transsexuals. Understandably, the views and feelings of other users, whose rights are equally protected by law, may differ from that of the transsexuals. In the States, for instance, the relevant debate has centred on whether "biology-based" toilets and changing rooms for public use or at schools should be banned as discriminatory.

of entitling the individual to enjoy the full measure of the right concerned. As *Goodwin* put it in para 101, it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry (under the then English law) as they remain able to marry a person of their former opposite sex. The Court pointed out that the applicant in that case lived as a woman, was in a relationship with a man and would only wish to marry a man. She had no possibility of doing so. In the European Court's view, she might therefore claim that *the very essence* of her right to marry had been infringed. Earlier on, the Court had stated that limitations placed by the national law of a Contracting State on the exercise of the right to marry must not restrict or reduce the right in such a way or to such an extent that *the very essence* of the right is impaired (para 99).

229. I have no difficulty with this last proposition. It indeed highlights the crucial question to be asked and answered in the present discussion, namely, what is the essence of the right to marry in Hong Kong under the Basic Law or under the ICCPR as applied to Hong Kong? Unless this prior question is properly answered, it is impossible to discuss usefully how a transsexual may meaningfully enjoy the full measure of the right to marry, or whether the existing law infringes the "very essence" of the transsexual's right to marry.

230. The history of the development of the relevant European jurisprudence which culminated in the 2002 decision in *Goodwin*, has demonstrated clearly that the essence of the right to marry is capable of change, depending on the relevant standards of the Contracting States and the presence or absence of a convergence of standards. Although the European Court did not spell out precisely what the essence of the right to

marry had become in Europe by 2002, it is apparent that by then, in the Court's view, the essence of the right was sufficiently broad to cover a post-operative transsexual marrying in his or her acquired sex (see para 100).

231. Given that view, the European Court quite naturally found that the United Kingdom's continued disregard of a post-operative transsexual's acquired sex for the purposes of marriage infringed "the very essence of [the transsexual's] right to marry" (para 101).

232. By way of contrast, it is apparent that in the European Court's view, even by 2010, the essence of the right to marry under the European Convention still does not encompass a homosexual or lesbian couple: *Schalk*. This is the position regardless of whether the individuals concerned may otherwise "meaningfully enjoy" the right to marry with someone of the appropriate sex or whether they would "wish" to do so.

233. Thus analysed, it is plain that the present argument based on a supposed infringement of the very essence of the right to marry merely begs the crucial question in the present case, that is, what is the essence of the right to marry in Hong Kong as of now? As explained, this question can only be answered by reference primarily to the contemporary societal consensus in Hong Kong regarding marriage and to the relevant international standards and convergence of standards (if any) under the ICCPR. These matters have already been dealt with at length.

234. In short, the argument under discussion does not of itself significantly advance the applicant's case.

5.17 How best to classify a post-operative transsexual

235. Another argument is that given that we only have two sexes, male and female, man and woman, the question is really whether, for all legal, medical, social and practical reasons, a post-operative transsexual should be classified by reference to his or her acquired gender for the purposes of the law of marriage. The argument is modelled on the one that succeeded in *W v W (Physical Inter-sex)* [2001] Fam 111, 144-147.

236. As Mr Dykes put it, given that everyone is, in the eyes of law, either a male or female, and since all residents enjoy the right to marry, to classify a post-operative transsexual resident according to his or her biological sex at birth is tantamount to saying that the person has no right to marry, which contradicts one of the two basic premises, namely that all residents shall have the right to marry.

237. If one had been tasked with designing or re-designing the institution of marriage, and with drawing up the rules and regulations, and therefore law, to define and regulate the institution, one would have found Mr Dykes' argument a very persuasive one. If one were starting everything from scratch, and one were free from pre-existing traditions, culture and societal understanding and values, and were free to assign to a post-operative transsexual the most appropriate sex or gender to govern his or her right to marry, Mr Dykes' argument would have been given substantial weight. Or, likewise, if one had been given a judicial licence to engineer a fundamental social and legal reform of the current institution of marriage.

238. However, as explained, one is not concerned with what the law ought to be, rather than with what the law really is. That being the case, Mr Dykes' argument is not decisive at all. Whilst it certainly still carries force, it is just one amongst many considerations that the Court should take into account in deciding how the constitutional right to marry should be interpreted in the light of present day circumstances.

5.18 Government's actions

239. Then there is the argument that it is the Government who funds and, through the Hospital Authority, carries out the relevant assessment, hormonal treatment and sex reassignment surgery, and it is the Government who allows the change and replacement of identity card, and therefore it is illogical and wrong for the Government to deny a post-operative transsexual the right to marry in his or her acquired sex. With respect, I do not see the force of the argument, even though it has been relied on in cases such as *Goodwin* (at para 78).

240. Insofar as the Government's actions are used as evidence of a shift in societal understanding or an emerging societal consensus, I have already dealt with them and will not repeat myself here. Insofar as the actions are relied on to found a sort of estoppel or legitimate expectation argument, it would only have force if by its words or conduct, the Government had made an unambiguous representation to a transsexual contemplating whether to undergo treatment or to undergo the irreversible sex reassignment surgery that after the surgery, the Government would allow him or her to marry in the acquired gender. Certainly, one cannot find any such representation from the words or conduct of the Government.

The law of marriage in Hong Kong has remained unchanged throughout. A transsexual contemplating to undergo a sex reassignment surgery is at liberty to enquire with the Marriage Registry regarding its attitude and to consult a lawyer as to the present state of the law of marriage in Hong Kong, before deciding to embark on the surgery. No allegation of misrepresentation is made by the applicant in the present proceedings.

241. As Ms Carss-Frisk has submitted, the measures taken by the Government are really measures taken to alleviate the plight of those who are unfortunate enough to be suffering from transsexualism and to make life easier for them, whether pre-operation or post-operation. One cannot turn those measures around and say that, therefore, the Government must go all the way to allow post-operative transsexuals to marry in their acquired gender. The latter simply does not follow logically from the former. Put another way, the Government's option is not restricted to choosing between doing all and doing nothing.

5.19 No harm to others or society

242. It has been said in some cases that allowing a post-operative transsexual to marry in his or her assigned sex would do no harm to others or to society: for instance, *Otahuhu*, at p 607. However, as has been pointed out by the majority in *Bellinger* (CA), marriage is not and has never been an entirely private matter. It is a matter of status and is not for the spouses alone to decide. It affects society and is a question of public policy (para 99).

243. Indeed marriage confers status – both legal and social. Absent a corresponding societal consensus regarding marriage of post-operative transsexuals in their assigned gender, the unilateral conferment of the legal and thus social status on transsexuals by expanding the legal definition of marriage in the relevant constitutional provisions would not be justified, as the Court would be seeking to reform fundamentally social norms and practice through the backdoor. It is not for the Court, sitting in a constitutional challenge, to seek to engineer a fundamental social and legal reform; it is a matter constitutionally reserved for the Government and Legislature, which may always, by legislation, confer on people status and rights that go beyond the minimum protections guaranteed under the constitution.

244. Moreover, although transsexuals are a minority group in society, the issue raised in this application would, as explained, have implications for other possible forms of same sex marriage (see below).

5.20 Anomalies

245. As regards anomalies, it has been pointed out that the present law is absurd in that it actually allows a post-operative transsexual woman to marry a woman, rather than a man. That would in fact amount to a same sex marriage that the Government does not permit.

246. But that begs the question of what a same sex marriage is. Indeed, to an *uninformed* observer, the couple would be a same sex couple. But an *informed* observer would know otherwise.

247. In any event, there can be a variety of anomalous situations whether the law is changed or remains as it is, depending on the life style, pre-existing marital status and sexual orientation *etc* of the individuals concerned.

248. The presence or absence of anomalous situations cannot by itself be decisive of the question faced by the Court.

5.21 Other forms of same sex marriage

249. Then there is the argument that the right that post-operative transsexuals like the applicant are fighting for is fairly different from the right to same sex marriage which some homosexual and lesbian couples might wish to have. Regardless of the legal, moral or social reasons (if any) against homosexual and lesbian marriages, the argument runs, one must not lump the two different cases together.

250. The Court wishes to make no observation on possible homosexual and lesbian marriages. The Court accepts that there are some distinctions between the two types of marriage, and it would be an over-simplification to treat the type of transsexual marriage that the applicant is seeking as being no different, in substance, from a same sex marriage involving a homosexual or lesbian couple.

251. However, insofar as sex is legally determined by biological criteria, there can be no escape that the form of transsexual marriage fought for by the applicant in the present case is a form of same sex marriage. Inevitably, any change in the law in this regard would have an

impact on the wider question of how other possible forms of same sex marriage should be handled in Hong Kong, as to which there is, quite plainly, no general societal consensus or understanding.

5.22 Importance of the right

252. Finally, there is the argument that allowing a post-operative transsexual to marry in his or her newly acquired sex is of great significance to the individual, as many other rights, interests and privileges as well as status in our society are dependent on the status of marriage. Still more importantly, it concerns the individual's inherent human dignity, equality and respect.

253. I readily accept the point so far as it goes. It only highlights the importance of the issue in question. In itself, it does not provide an answer to the issue that has to be decided.

254. In any event, this argument does not necessarily lead to expanding the definition of marriage to encompass a post-operative transsexual as the only possible answer. So far as rights, interests and privileges in society are concerned, civil partnership could also provide the necessary solution.

5.23 Conclusion on the 2nd issue

255. For my part, I see insufficient changes that have taken place thus far, and I find insufficient arguments, to justify giving article 37 of the Basic Law or article 19(2) of the Hong Kong Bill of Rights a new and wider scope of operation than it was originally intended when the Basic

Law and the Hong Kong Bill of Rights were enacted. The most important consideration that leads the Court to that conclusion is the absence of sufficient evidence in the present case to demonstrate a shifted societal consensus in present day Hong Kong regarding marriage to encompass a post-operative transsexual. Neither can one find any general consensus reached or emerging amongst the Contracting Parties to the ICCPR to that effect. Nor can the Court see any other compelling legal reasons for giving the constitutional right to marry an expanded interpretation.

256. In those circumstances, I conclude that the relevant provisions in the Marriage Ordinance do not infringe the right to marry guaranteed under article 37 of the Basic Law or article 19(2) of the Hong Kong Bill of Rights.

257. As explained, I do not think the reference to the right to privacy guaranteed under article 14 of the Hong Kong Bill of Rights adds anything to the argument.

258. In other words, the applicant's challenge based on the constitutional provisions also fails.

6 ICJ'S INTERVENTION

259. The International Commission of Jurists ("ICJ") has sought leave to intervene in the present proceedings by means of written submissions. Established in 1952, the ICJ is a well-known international non-governmental organisation and has its headquarters in Geneva, Switzerland. It works to advance the rule of law and to ensure the

domestic implementation of international human rights law. It promotes states' compliance with their international human rights legal obligations. It has significant expertise in the application of international human rights law to violations based on sexual orientation and gender identity. It helps develop the *Yogyakarta Principles on the Application of International Human Rights Law to Sexual Orientation and Gender Identity*. In 2009, it published the *Practitioners' Guide on Sexual Orientation, Gender Identity, and International Human Rights Law*. On a regular basis, the ICJ submits written interventions in cases before the European Court of Human Rights, the UN treaty bodies and national courts.

260. On a provisional basis, the ICJ has submitted a 7-page written argument to the Court which supports the applicant's position. The written argument deals with *Corbett* and the current state of the law in the United Kingdom and in Hong Kong. It also deals with the recognition of change of gender and the right to marry in other jurisdictions.

261. The case law governing third party intervention has been summarised in Fordham, *Judicial Review Handbook* (5th ed) 223 to 229, in particular para 22.2.10. In *E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536, paras 2 and 3, Lord Hoffmann pointed out that leave is frequently given to statutory bodies and non-governmental organisations to intervene and make submissions, usually in writing but sometimes orally from the bar, on questions of general public importance, in the expectation that their fund of knowledge or particular point of view will enable them to provide the court with a more rounded picture than it would otherwise obtain. An intervention is however of no assistance if it merely repeats points which a party has already made. It is not the role of

the intervener to be an additional counsel for one of the parties. That is particularly important in the case of an oral intervention.

262. I am satisfied that the intervention by ICJ through written submissions in the present proceedings is both helpful and justified. The Court is assisted by the submissions made, particularly in relation to the global scene and to the position in Asia. Moreover, the intervention is to a limited extent; only written submissions have been filed; no oral participation has been sought.

263. Leave to intervene is granted accordingly.

7 OUTCOME

264. For the reasons explained, the application for judicial review is dismissed. If the Court had been with the applicant on the second issue, the Court would have been minded to consider granting a temporary suspension order (see generally *Koo Sze Yiu v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441; *Chan Kin Sum Simon v Secretary for Justice*, HCAL 79/2008, 11 March 2009, Andrew Cheung J), in order to give the Government and the Legislature time to work out new statutory provisions to define the circumstances under which a post-operative transsexual might marry in his or her assigned gender and to deal with other related matters.

265. The Court makes a costs order *nisi* that the costs of these proceedings, including all costs previously reserved, be paid by the applicant to the respondent, to be taxed if not agreed, with a certificate for

three counsel (in view of the complexity of the case). There shall also be legal aid taxation of the applicant's own costs. The Court makes no costs order in respect of ICJ's intervention.

8 POSTSCRIPT

266. Before parting with the case, the Court wishes to highlight several matters. First, the Court fully recognises that we live in a rapidly changing world. Social mores and societal practices, like almost everything else, are not immune from gradual or even swift change. The law, and in particular, the fundamental rights guaranteed under our constitutional instruments, must evolve and keep up with these changes, in order to be and to remain relevant. The result in the present litigation is not necessarily determinative of the same or similar issues in future. Any future challenge must be dealt with and decided according to the circumstances then prevailing. However, at least for the time being, the Court has spoken on the issues according to present day circumstances.

267. Secondly, the Court is acutely conscious of the suffering and plight of those who suffer from transsexualism, and the prejudice and discrimination they face as a minority group in our society, even though there are signs that people are becoming more sympathetic and accepting in attitude generally. That alone, however, is quite insufficient to found the fundamental change in the law sought by the applicant in the present case.

268. Thirdly, it is certainly hoped that the Government would not view the result of this litigation as simply a victory, particularly not as a

victory over those who have the misfortune to be suffering from transsexualism. Rather, it is hoped that this case would serve as a catalyst for the Government to conduct general public consultation on gender identity, sexual orientation and the specific problems and difficulties faced by transsexual people, including their right to marry. The Government might wish to consider including in the consultation related issues and problems, such as same sex marriage, civil partnerships and the rights and difficulties of those involved, and to find out generally what members of our society think in relation to these sensitive matters and where the public good lies.

269. It only remains for the Court to thank counsel on both sides and their respective supporting teams, as well as the ICJ, for the assistance they have rendered to the Court in this unusual case.

(Andrew Cheung)
Judge of the Court of First Instance
High Court

Mr Philip Dykes SC, Mr Hectar Pun and Mr Earl Deng, instructed by Vidler & Co, for the applicant

Ms Monica Carss-Frisk QC, Ms Lisa K Y Wong SC and Mr Stewart K M Wong, instructed by the Department of Justice, for the respondent

International Commission of Jurists, intervening in person (by written submissions only)